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TWENTY-SECOND REPORT OF THE JUDICIAL COUNCIL

For Other Matters— *See Table of Contents on Page 1.*

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No. 144

TWENTY-SECOND REPORT
Judicial Council of Massachusetts
For the Year 1946

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The Commonwealth of Massachusetts

FEBRUARY, 1947

TO HIS EXCELLENCY, ROBERT F. BRADFORD

Governor of Massachusetts.

In accordance with the provisions of section 34B of chapter 221 of the General Laws (Ter. Ed.) we have the honor to transmit the twenty-second annual report of the Judicial Council for the year 1946.

FRANK J. DONAHUE, *Chairman.*
NATHAN P. AVERY, *Vice-Chairman.*
LOUIS S. COX,
JOHN E. FENTON,
JOHN C. LEGGAT,
WILFRED BOLSTER,
FRANK L. RILEY,
FREDERIC J. MULDOON,
SAMUEL P. SEARS.
WILFRED J. PAQUET,

ACTS OF 1924, CHAPTER 244

As amended by St. 1927, c. 923, and St. 1930, c. 142

Now appearing as G. L. (Ter. Ed.) Ch. 221, §§ 34A-34C

AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Be it enacted, etc., as follows:

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council," the following three new sections—*Section 34A.* There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The judicial council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of thirty-five hundred dollars.

MEMBERS OF THE COUNCIL

FRANK J. DONAHUE of Boston, *Chairman*
NATHAN P. AVERY of Holyoke, *Vice-chairman*

LOUIS S. COX of Lawrence
JOHN E. FENTON of Lawrence
JOHN C. LEGGAT of Lowell
WILFRED BOLSTER of Wellesley
FRANK L. RILEY of Worcester
FREDERIC J. MULDOON of Winthrop
SAMUEL P. SEARS of Newton
WILFRED J. PAQUET of Watertown

FRANK W. GRINNELL, *Secretary*, 60 State St. Boston

TWENTY-SECOND REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS

To His Excellency

ROBERT F. BRADFORD

Governor of Massachusetts

The Judicial Council was created by St. 1924, Chapter 244 (*See copy printed on opposite page*), "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished and the results produced by that system and its various parts."*

Since the last report Samuel P. Sears of Newton was reappointed as a member of the Council for a four-year term by Governor Tobin.

RECOMMENDATIONS ADOPTED IN 1946

During the last session of the legislature the following recommendations of the Council were adopted in addition to various negative recommendations on matters referred to the Council by the legislature which were followed.

The recommendations adopted appear in the statute book for 1946 as:

Chapter 275, relative to sentences of persons already under sentence to the Massachusetts Reformatory (see 21st Report, 30);

Chapter 276, relative to further sentencing of persons already under sentence to State Prison (see 21st Report, 35);

Chapter 342, relative to the service of process on certain foreign corporations (see 21st Report, 38);

Chapter 448 regulating appeals from commitment of neglected children (see 21st Report, 27);

Chapter 450 relative to the admission of material facts and documents. The draft of this act submitted by the Council was revised by the Judiciary Committee and passed in the revised form (cf. 21st Report, 57);

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* In 1925, the legislature also submitted the following request to the council.

1925 RESOLVES, CHAPTER 27

"Resolved, That the judicial council is hereby requested to investigate ways and means for expediting the trial of cases and relieving congestion in the dockets of the Superior Court, and, among other things . . . ways and means for encouraging, so far as consistent with constitutional rights, trials without jury . . . and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. (Approved April 24, 1925)."

Chapter 473, providing for the admissibility in evidence of properly kept hospital records of other states as the records of Massachusetts hospitals are admitted (see 21st Report, 56).

The reasons for these statutes can be readily found in the 21st Report (Public Document No. 144) reprinted in the Massachusetts Law Quarterly for December 1945.

Reports Requested by the Legislature of 1946

This year the "subject matter" of twenty-one (21) bills, or resolves, pending before the legislature were referred to the Council with requests for a report on each. On these matters we report as follows:

Senate 302

By Resolves Chapter 44 the Council was requested to investigate and report its recommendations on the subject matter of Senate Bill 302 which reads as follows:

An Act penalizing certain strikes affecting the public health and public safety

Chapter one hundred and forty-nine of the General Laws is hereby amended by inserting after section one hundred and forty-two F, inserted therein by chapter three hundred and four of the acts of nineteen hundred and thirty-three, the following section, under the heading *Strikes Affecting the Public Safety and Public Health.*

Section 142G. The paramount interests of the public safety and public health requiring that certain public services, whether performed by or for the commonwealth or any political subdivision thereof, or for the inhabitants of any territorial subdivision thereof, shall not be interfered with or lessened by voluntary action of any person or group of persons, no person employed in any public service, other than federal, the lessening or cessation of which would adversely affect the public safety or public health, or either, shall take part in any strike adversely affecting such public service. Whoever violates any provision of this section shall be punished by a fine of five hundred dollars.

The subject matter of this bill relates to a question of substantive law involving such broad questions of legislative policy that the Council is neither organized nor equipped to investigate the subject, hear those who might wish to be heard in regard to it, and prepare an adequate report in regard to it. The Council therefore respectfully asks to be excused from reporting on the question involved.

EXCEPTIONS AND APPEALS IN EQUITY AND IN THE PROBATE COURTS AND THE FORM AND METHOD OF PREPARING THE RECORD FOR THE SUPREME JUDICIAL COURT IN APPELLATE PROCEEDINGS

Chapters 469 and 530 of 1945 — Senate 235 and 238

By Chapter 469 of the acts of 1945, Section 9 of Chapter 215, of the General Laws relating to probate courts was amended by adding:

"In lieu of an appeal a person aggrieved may allege exceptions as provided in Section 113 of Chapter 271."

By Chapter 530 of the acts of 1945, Chapter 231 was amended by inserting a new section.

"96A. In suits in equity a person aggrieved by an opinion, ruling, direction or judgment of a single justice of the Supreme Judicial Court or Superior Court or of the Land Court may in lieu of claiming an appeal as provided in Section 96 allege exceptions as provided in Section 113."

As stated in the 21st Report of the Judicial Council (pp. 7–8) the purpose of these acts was to reduce the volume and expense of records in appellate proceedings. The effective date originally specified in both acts was March 1, 1946. The Council recommended postponement of the effective date to allow time for further study. Thereafter by Chapters 88 and 610 of 1946 the effective date of both acts was changed first to August 1, 1946 and then to March 1, 1947 and by Resolves Chapter 7 and Chapter 94 the Judicial Council was requested to "further investigate the subject matter."

Meanwhile two bills (Senate 235 and Senate 238) proposing other changes in appellate procedure, both in equity and in the probate courts, were introduced, the detailed specifications being contained in S. 235 relating to equity cases, and S. 238 (relating to proceedings in the probate courts) simply incorporating by reference the specifications in S. 235. Thereafter, by Resolves Chapters 8 and 12, both bills were referred to the Council with a request for a report on "the subject matter."

The subject matter of all these resolves involves controversial questions as to which there has been marked difference of opinion among members of the bench and bar.

Discussion of the Acts of 1945

First as to Chapter 530 of 1945, relating to equity cases.

The General Court, apparently, overlooked the fact that by Section 144 of Chapter 231, Section 113 providing for exceptions was expressly made applicable to equity cases in addition to a right of appeal. (See also G. L. Chapter 214 §§ 25 and 25A.)

We recommend the repeal of Chapter 530, on the ground that it is unnecessary and that, because of its phraseology, it would confuse practice throughout the commonwealth. We submit later in this report certain recommendations as to equity procedure.

Second as to Chapter 469 of 1945, relating to probate courts.

The present methods of carrying cases to the Supreme Judicial Court for review differ in different courts and in different kinds of cases in the same courts.

I. In cases at law tried by a jury only questions of law may be carried up and this is done by a bill of exceptions in Massachusetts.

II. In cases at law tried before a judge *without a jury* the same rule applied, the decision of the single judge having the same finality as a verdict of a jury.

III. In equity cases, which are always tried before a judge without a jury (except in rare cases, in which special issues are ordered tried by jury) the usual method is by appeal which carries up not only questions of law but questions as to the soundness of the single justice's findings of fact and exercise of discretion — in other words the whole case (provided all the evidence on the questions raised is reported and printed and this is sometimes expensive).

IV. In the Land Court in contested cases (under G. L. Chapter 185 § 15) questions of law may be taken to the Supreme Judicial Court "in the same manner in which questions of law are taken to that court from the Superior Court"which means by bills of exceptions ordinarily, but in equity cases by bills of exceptions or by appeal. In contested cases in the Land Court the judge always files a written opinion on facts and law.

V. In the probate courts there have never been exceptions hitherto. Until 1919 there was a full appeal to a single justice of the Supreme Judicial Court under Revised Laws C. 162, and the case was retried under R. L. C. 173 § 106. In 1919 by C. 274 this practice was changed; the intermediate appeal to a single justice of the Supreme Judicial Court was abolished, and appeals from the probate courts directly to the full bench of the Supreme Judicial Court were provided for and placed on the same basis as appeals in equity cases before a single justice of the Superior Court so that an appeal carries up questions of law, fact, and discretion. These provisions of 1919 now appear in G. L. C. 215 § 19; G. L. C. 231 § 113, as already pointed out, provides for exceptions and S. 144 of

that chapter specifically applied S. 113 and other sections to proceedings in the probate courts and the Supreme Judicial Court upon an appeal from a probate court "*so far as they are applicable.*"

In the case of Mackintosh, Petitioner, 246 Mass. 482, 485, Chief Justice Rugg, speaking for the court, after describing the history of probate procedure decided that § 113 providing for exceptions was not "applicable" to probate courts. Accordingly the only method of carrying up questions from a probate court is by appeal.

The subject matter, including the two acts of 1945, referred to have been discussed in articles by Thomas H. Mahoney, Esq.; by Benjamin Goldman, Esq. (the petitioner for S. 235 and 238); by Messrs. Asa S. Allen and Richard Bancroft in the "Bar Bulletin" for March, April, and May 1946 respectively; by the Committee on the Amendment of the Law of the Boston Bar Association (see Bar Bulletin for November 1946, p. 259). See also Mr. Goldman's articles in the Law Society Journal for February 1946, and in 23 BU. Law Review (January 1943, 66–106). From these discussions, as well as others, there appears to be general agreement, with few exceptions, that have come to our attention, that both Chapters 530, relating to equity, and 469, to provide for bills of exceptions in the Probate Courts, would confuse practice and should be repealed. We have also inquired of the judges of probate in all the counties as to their views about those statutes and about bills of exceptions in the probate courts and they have expressed their views separately, but unanimously, in opposition to bills of exceptions and report that they know of no demand from the bar (with one exception) for such change.

Perhaps the most typically illuminating account in detail of the effects the acts of 1945 would have on the probate courts is the letter of the judge of the Berkshire Probate Court who says:

"I believe it would be a great mistake to allow these statutes to become effective. I cannot understand why they were ever enacted in the first place.

"Speaking for the court over which I preside here in Berkshire I feel quite positive that the members of the Berkshire Bar would be unanimously opposed to such legislation. There is no need of it here. . . . Little, if anything, would be saved litigants by allowing them to go up on bills of exception instead of appeals. Lawyers are accustomed to the present method and all those I've talked with prefer that no change be made. . . .

"If the statute allowing appeals becomes effective we will have to have full time stenographers. At the present time we don't have a stenographer in court on average of more than one or two days a month. Stenographers capable of taking court dictation are scarce, and they demand and get big wages. The cost of having one attend court regularly would be considerable.

"Our whole system of hearing cases would have to be revamped here in Berkshire. We allow attorneys to mark up cases for hearing any day when there is

hearing time available on the court calendar. I am here daily from 9:30 to 4 or 4:30, but am not on the bench all that time. Much of my work is "paper work," as you know, and is done in chambers. I might hear a matter at 10 o'clock which lasts till 10:30. Then I might be in chambers for an hour and then hear a case from 11:30 until 12:30. Then work in chambers till 2:30, then hear three or four uncontested divorce cases which might take an hour. From 3:30 till 4:30 I might hear cases or I might be in chambers working or keeping appointments with people who wish to see me on probate matter. All this time the stenographer, under the proposed plan is present, taking testimony while cases are heard and just hanging around the rest of the time.

"The lawyers like our system of marking cases and would resent any change which would require all cases to be marked for designated days just to keep a court stenographer busy. Many of them have to travel 25 or 30 miles to get here, and they like to be able to try their cases on the days most convenient for them to be in Pittsfield.

"In brief, we do not have enough work here to keep a stenographer busy five days a week. We probably couldn't hire one for three days a week. The one we use now is a married woman and we have to give her at least a couple of days notice when we want her in court.

"Our present system seems to satisfy the members of the bar who, after all, are the ones best able to judge whether there should be a change. The statute allowing bills of exception would be a burdensome and unwarranted expense and would throw out of gear the machinery which, to date, has operated to everyone's satisfaction here in Berkshire County."

The other letters express similar views.

We received from the county commissioners of Essex County a copy of the following vote:

"At a regular meeting of the County Commissioners held at Salem on Tuesday, May 28, 1946, Chairman Thompson and Commissioners Manning and Pratt were present.

"Upon motion of Mr. Manning, seconded by Mr. Thompson, it was unanimously VOTED:

"That the Judicial Council be advised that the County Commissioners of Essex County are opposed to the provisions of Chapter 469 of the acts of 1945, entitled 'An act providing for bills of exceptions in probate proceedings,' which act amended Section 9 of Chapter 215 of the General Laws, because of the estimated cost of $8,000 to the County of Essex to carry out the provisions of this act."

Reports from other counties estimate comparable increased expense of substantial amounts for official stenographers (assuming that they could get them) which would be added to the already large cost to the counties of maintaining the courts. The reports also show that outside of the Metropolitan district it is very difficult to secure competent court stenographers in addition to those now acting in the Superior Court.

The following figures from the various counties are illuminating as to the number and cost of appeals.

STATISTICAL INFORMATION RECEIVED FROM THE PROBATE COURTS

Berkshire County

"From 1941 to 1945 inclusive, ten appeals were claimed. Four of these were entered in the Supreme Judicial Court, the total cost for printing the record in these four cases was $533.50, the average in each case being $133.40. In the remaining six cases the appeals were dropped before any expense of printing was incurred."

Hampshire County

"We have had four appeals and one reservation and report since 1938. They are listed as follows:

1939 — One appeal. Cost of record	$47.60
1940 — One appeal. Cost of record	58.00
1941 — One appeal. Cost of record	230.00
1941 — One reservation and report, cost of record	56.00
1944 — Construction of will. Cost of record	48.60
Six year total	$439.20

Cost of Stenographer in Hampshire County Probate Court 1940–1945
1940 — $53; 1941 — $45; 1942 — $61.80; 1943 — $33.24; 1944 — $00.00; 1945 — $17.16.

Plymouth County

"We do not average more than two or three appeals annually."

Franklin County

"There are are few probate appeals in this county — probably much less than one a year since 1914."

Bristol County

	1940	*1941*	*1942*	*1943*	*1944*	*1945*	*Six Year Total*
Appeals	3	5	9	7	3	6	33
Reports filed	0	1	0	0	0	0	1
Net cost of record		$204.00	$260.60	$375.80	$816.45	$129.40	$1,786.25
Appeals entered in S. J. C.	0	2	2	1	1	3	9

Detailed figures as to appeals in other probate courts in Worcester, Essex, Middlesex, Norfolk and Suffolk counties will be found in Appendix B, pp. 94-95.

The net result of our inquiries and consideration is that we not only find no substantial opinion of the bench or bar in favor of intro-

ducing bills of exceptions in the probate courts, but we do find widespread, substantial opinion against it and emphatically in favor of the repeal of Chapters 469 and 530 of 1945. We recommend the following:

DRAFT ACTS

1. Chapter 469 of the Acts of 1945 is hereby repealed.
2. Chapter 530 of the Acts of 1945 is hereby repealed.

Later in this report we recommend a draft act for certain changes in place of the provisions of these acts.

SENATE 235 AND SENATE 238

These bills will be considered together as Senate 238 would simply apply to the probate courts by reference, the provisions of Senate 235 *if it should be enacted.*

Senate 235 is entitled "an act relative to facilitating appeals in proceedings in equity and reducing the cost thereof." Section 1 contains the substance of the bill and it would strike out Sections 23 as amended and 24 of Chapter 214 of the General Laws which are printed in a footnote.*

In place of these two sections Senate 235 would insert new sections, each with many subdivisions.

The first paragraph is a mandatory provision for an official stenographer in "any issue of fact."

*Section 23 (as amended by St. 1945 C. 394, §1) *now* provides:
"§23. *Report of facts.* — The justice of either court by whom a decree was made, if a written request by any party entitled to appeal therefrom is filed in the office of the clerk of such court within four days after such party has been notified of the entry of the decree, shall report the material facts found by him within thirty days after the filing of the request as aforesaid or within such further time as the chief justice of such court may grant, upon written request by such justice within said thirty day period; provided, that where such decree is entered upon an order made by a justice other than the one entering the decree, such other justices shall make the report of material facts requested under this section. If no request for a report of material facts is so filed, such report shall be in the discretion of the justice. (1945, 394, §1, effective Oct. 1, 1945)."

Section 24 *now* provides:
"§24. *Report of Testimony upon Appeal.* — Upon an appeal, the testimony of witnesses who have been examined orally before a justice of either court shall, at the request of any party made before any evidence is offered, be reported to the full court. The courts shall provide by general rules for some convenient and effectual means of having the same reported by the justice by whom the case is heard or by a person designated by him for that purpose. Except as provided in section one hundred and twenty-five of chapter two hundred and thirty-one, no oral evidence shall be exhibited to the full court, but the cause shall be heard on appeal upon the same evidence as on the original hearing."

So far as the probate courts are concerned the reasons against this mandatory requirement have already been stated. As to equity cases in the Superior Court a court stenographer is now present during sessions for hearings on the merits. The proposed language would make this mandatory every time a motion is heard involving any question of fact whether anyone wanted him or not. We see no need

of this provision and do not recommend it. The reason for the proposal, we understand, was to do away with the present requirement of a "request before any evidence is offered" in Section 24 above quoted. We agree that the request *at that time* should not be required and have so provided in the draft act submitted later herein.

Reports of Material Facts

Section 23A (*a*) would *require* a judge, whether requested or not, in every equity case, to "*make detailed findings of all the subsidiary and all the ultimate facts which are pertinent to the issues and — state separately his conclusions of law thereon* and shall then direct the entry of the appropriate decree."

We do *not* recommend this section.

In the first place — *We see no occasion for detailed reports in equity unless requested, but we believe the time for such request should be extended from the present four to ten days* and have so provided in the draft act herein.

In the second place, the section appears to be based on Federal Rule 52, but contains mandatory language, (not in the federal rule) which, in our opinion, would cause confusion and delay and unnecessary controversy. The Federal rule provides that "the court shall find the facts specially and state separately its conclusions of law thereon." The reason for and nature of this provision is stated by the Advisory Committee on Rules (which prepared it) in its recent report (on Amendments) to the Supreme Court of the United States in June 1946 (p. 67) as follows: (citations omitted)

> "Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. . . . These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel . . . Consequently they should be a part of the Judge's opinion and decision, either stated therein or stated separately. . . . But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; *there is no necessity for over-elaboration of detail or particularization of facts.*

In other words the rule merely calls for the present better judicial practice in preparing reports, not only in equity, but in the Land Court, where written decisions are filed in practically all contested cases. This practice, and the sort of thing that it does not contemplate, appears in the recent opinion in *Fields et al* v. *Parasaskis*, 318 Mass. 726 in which the court said:

> "The defendants in this bill in equity . . . made a motion that the judge make another 'report of material facts' prepared by the defendants which added more

than two thousands words to the 'findings of material facts' already filed. To the refusal of the judge to adopt and report . . . they claimed an exception, which they present to us on a bill of exceptions.

"It is true that when a judge refuses, after timely request under G. L. Ter. Ed. C. 214, Sec. 23, to 'report the material facts found by him' his refusal to perform his statutory duty may sometimes be such error of law (*Porter* v. *Porter*, 236, Mass. 422) as to give ground for an exception under G. L. Ter. Ed. C. 231, Secs. 113, 144. *Snow* v. *Boston Blank Book Co.* 153 Mass. 456. . . . But the material facts that a judge in an equity case may be required to report are facts that the judge acting in good faith thinks material to the decree entered by him and that form the basis for it, and not facts material merely to the case in some aspect of it. This is fully explained in our decisions. *Plumber* v. *Houghton & Dutton Co.* 277 Mass. 209 . . .

"The right of an appellant to require a report of material facts is not a right to catechize the judge, or to require him to deal specifically with alleged facts selected by the appellant. The appellant must accept the report that the judge makes, and argue his appeal upon that report together with the rest of the technical record, which does not include the evidence, unless the appellant has taken the precaution of seasonably requiring, and thereby making part of the record, a report of the evidence under G. L. Ter. Ed. C. 214, Sec. 24, or 215, Sec. 12. *Merrill* v. *Everett*, 293 Mass. 327. . . . The exception taken by the defendants is founded upon a misunderstanding of our settled equity practice. . . .

"Obviously the facts stated in the bill and those found by the judge supported his final decree. . . . The extensive litigation of which the defendants complain was caused by their own unconscionable conduct. . . . The appeal and bill of exceptions are frivolous." Double costs and 12% interest imposed.

Shortening the Record

This subject has been discussed from time to time for many years, particularly in connection with long and complicated cases (see 2nd report of Judicature Commission, p. 68–70, 13th Judicial Council report, p. 41.)

Sections 24 (b), (c), (d), (e), and (f).

These provisions as to "the mechanics" of preparing the record (as stated by the petitioner in his article in the "Bar Bulletin" for April 1946, p. 80) are "based upon Federal Rule 75." The present law as to records appears in *Wyness* v. *Crowley* 292 Mass. at pp. 460–61. It recognizes the possibility of omitting immaterial matter when the appealing party wants to appeal on the pleadings and on the judges findings. Where the evidence is to be reported, however, the opinion does not appear to recognize the possibility of abbreviation. One of our most experienced judges has written us:

"I would like to see a method by which the evidence in equity appeals can be cut down to that which is really pertinent to the true issues and by which it will be impossible for an unreasonable litigant to force his adversary to print an unnecessary bulk of immaterial matter. *I am by no means convinced that that cannot be*

done. I am not sure that this is the way. Perhaps more could be accomplished in the long run by not trying to do so much at once and by reducing the proposed statute to a few simple provisions cutting down the amount of evidence required to be printed and perhaps employing *the designation method* for that purpose."

There are various forms of "designation method." One was referred to in our 21st Report (p. 8) as commonly used in the 3rd and 4th Federal Circuits. Another, with which many members of the Massachusetts bar are more familiar because of its common use in the Federal courts in Post Office Square, is Rule 14 of the Circuit Court of Appeals for the 1st Federal Circuit. There are also methods in use, or suggested, by which the record may be abbreviated with the approval of the court if the parties do not agree. *This whole subject is one of detail in the light of the decisions and practice of the Supreme Judicial Court and seems peculiarly a matter to be regulated, if regulation is needed by rule of that court rather than by wholesale legislation.* It seems very probably within the words "preventing delay" or "expediting the decision of causes" or "remedying abuses and imperfections in practice and diminishing costs," all of which are recognized as the subject matter for rules of court by G. L. Chapter 213, Section 3. We think this would be more clearly understood, however, if Section 24 of Chapter 214 which provides for a report of the evidence on request were amended by a specific provision that the court may by rule authorize and regulate the diminution, or abbreviation, of the evidence and the record on appeals to matters really pertinent to the true issues. We so recommend and include a provision for this slight clarification in the draft act submitted. The court can then consider what, if any, changes of detail will be helpful and possible in the light of *Gordon* v. *Guernsey*, 316 Mass. 106. The court, of course, suffers as well as the litigants when records are too long, because they have to read them. We attach in a footnote the number and costs of equity appeals since 1941 in Suffolk County where most of the equity business is done.*

*Number and cost of Equity Appeals in Suffolk Superior Court

The total number of records includes appeals in suits in equity as well as proceedings under the Compensation Act, as compensation cases are sometimes treated as equity cases. The figures are broken down to show the proportion of compensation cases to the total records prepared.

	Number		*Cost*
1941			
Appeals	26	Records	$6,910.50
Workmen's Compensation	6	"	606.00
	32		$7,516.50
1942			
Appeals	22	"	$3,661.00
Workmen's Compensation	6	"	548.00
	28		$4,209.00
1943			
Appeals	26	"	$4,766.00
Workmen's Compensation	14	"	2,266.00
	40		$7,032.60
1944			
Appeals	18	"	$2,628.00
Workmen's Compensation	4	"	331.00
	22		$2,959.00
1945			
Appeals	21	"	$3,965.00
Workmen's Compensation	9	"	1,105.00
	30		$5,070.00
1946 (January-June, inclusive)			
Appeals	15	"	$5,609.00
Workmen's Compensation	2	"	189.00
	17		$5,798.00

Section 23A (*b*) seems unnecessary as the court can amend its findings without any statute (see *Kevorkian* v. *Moors*, 299 Mass. 163, 166.)

Section 23A (*c*) provides that "any party may file requests for findings of facts or rulings of law, but they shall not be necessary for the purposes of review" and that the court *must* act on requests for rulings.

We do *not* recommend this section. We know of nothing to prevent a party from filing *a brief* with the judge at the close of a hearing, on points which he considers important. It is not uncommon for counsel "to fire a mass of requests at the trial judge upon which his ruling will be of little consequence and by which counsel can pester and bedevil the judge and pad the record." We see no reason for encouraging this. We assume that as a matter of inherent power the Supreme Judicial Court can, if it is satisfied that justice requires, recommit a case to the trial court for additional special findings (see also G. L. C. 231 §124) just as the Superior Court may recommit a case to a master or to the Industrial Accident Board for the same

purpose and, as all questions are open, on an appeal with a full record, the opportunity to file *briefs* seems to us sufficient.

For cases in which a party wishes to go up merely on requests for rulings of law we suggest a method of so doing in the draft act submitted herewith.

Section 24 (*a*) allows a partial appeal as in Federal rule 73 (b) which allows a party to "designate the judgment *or part thereof* appealed from." If the issues are separable there may be no objection to this, but, in many cases, the issues may be so intertwined as to make it impracticable. If any regulation in this direction is needed in the judgment of the Court we see no need of legislation as it seems a matter of detail within the recognized heads of rule — making specified in G. L. Chapter 213, Section 3.

Sections 24 (*g*) *and* (*h*) of Senate 235 provide for typewritten or multigraphed records.

We do *not* recommend this. In the case of short records the figures on probate appeals show that the cost of printing is not heavy. In the case of long records the strain on the eyes of the judges of the Supreme Court of typewritten records would be such that it would be poor business judgment to put that strain on the judges who have to do so much constant reading of records which are often poorly prepared.

The "Plainly Wrong" or "Clearly Erroneous" Rule

Section 24 (*i*), (*j*), (*k*), (*l*), *and* (*m*)

Without discussion the details of all of these sections we turn to *Section 24B* (*a*) which provides that "the Supreme Judicial Court shall examine" the evidence and record reported "and determine the subsidiary and ultimate facts upon its own independent judgment and order the entry of the appropriate decree as justice and equity may require" and *24B* (*b*) provides that "wherever any subsidiary" (why not also ultimate?) "fact found . . . depends upon the credibility of oral evidence or witnesses the . . . finding . . . *shall be prima facie evidence of said fact and shall be considered as such by the Supreme Judicial Court . . .*"

In his article explaining his bill in the Law Society Journal for February 1946 the petitioner, Mr. Goldman, after referring to the case of *Bernhardt* v. *Atlantic Finance Corp.* 311 Mass. 183–4–5, as stating the "plainly wrong" rule of the Massachusetts court, states that the reason for proposing that the trial judges findings "shall be prima facie evidence . . . and considered as such by the Supreme Judicial Court" is as follows:

> "When is a judge 'plainly wrong (or 'clearly erroneous?' What the words 'plainly wrong' or 'clearly erroneous' mean no one as yet has been able to determine. No case in Massachusetts has defined those words. However, the 'prima facie evidence' rule has already been clearly defined and lawyers know pretty well what

it means. That rule has been stated and described very carefully in the case of *Cook* v. *Farm Series Stores*, 301 Mass. 564, 567."

He discussed the matter more fully in his article in the B. U. Law Review for January 1943 (pp. 79–85).

Quite an extended discussion of the practical meaning of the phrase "clearly erroneous" as used in Federal Rule 52 and as commonly applied by appellate courts in equity (sometimes, as in our reports, by the phrase "plainly wrong") appears in the opinion of the Circuit Court of Appeals for the 2nd Circuit in *U. S.* v. *Aluminum Co. of America*, 148 Fed. 416 at p. 433 as follows:

"It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded. This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift and to make the proper inferences from it; *and in the case of a record of over 40,000 pages like that before us*, it is physically impossible for an appellate court to function at all without *ascribing some prima facie validity to his conclusions*. What the plaintiff is really asking is that we shall in effect reconsider the whole evidence de novo, as though it had become before us in the first instance. The impossibility of that at once appears, if we consider what it would have involved, had the appeal taken its usual course and been heard by the nine justices of the Supreme Court. However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they "must be treated as unassailable." . . . The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. . . . Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed "unassailable," except in the most exceptional cases."

The use of the words "*prima facie validity*" in this opinion should be noted. The practice of the Massachusetts court is more fully stated in the Bernhardt case referred to. After stating the "plainly wrong" rule, as to "findings," briefly, but substantially as stated in the Federal case quoted, the court continued,

"The recital of the judge in his report of material facts that the facts therein set forth are all the material facts upon which his order for decree was based does not affect this rule. It is still for us to decide the case upon our judgment as to the facts, giving due weight not only to those actually found by the judge but also to all other facts disclosed by the evidence, which we find ourselves."

In *Spiegel* v. *Beacon Participations*, the court said,

> "When this court is asked on appeal with full report of all the evidence to revise the findings of the trial judge it is 'only in a very clear and exceptional case that this can be done when the court of first instance has seen and heard the witnesses.' "
>
> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

We doubt the wisdom, in Massachusetts at least, of attempting to regulate by wholesale, the application of more or less artificial general phrases (whether by statute, rule, or judicial precedent) to the practice of the Supreme Judicial Court in the consideration of appeals. We believe that the interests of justice will be better served in the long run by leaving the approach of the appellate court (to the problem of possible mistakes of a trial judge) to the good sense of the Supreme Judicial Court rather than to invented phrases.

The trouble with phrases was described in an appreciative tribute in celebration of the ninetieth birthday of the late Justice Holmes, in 1931 (44 Harv. L. Rev. 688–9) in which the late Justice Cardozo said: "The repetition of a catchword can hold analysis in fetters for fifty years or more," and he spoke of the effectiveness of Justice Holmes in combating "the tyranny of tags and tickets," with a reference to page 230 of *Collected Legal Papers*, where Justice Holmes said:

> "I am struck with the blind imitativeness of man, when I see how a doctrine, a discrimination, even a phrase, will run in a year or two over the whole English speaking world."

For these reasons we do *not* recommend the proposal about "prima facie evidence" in §*24B* (*b*) of Senate 235.

The substance of §24A is printed in a footnote.*

Section 24A would seem to put it beyond the power of the court to deal adequately with dilatory and negligent conduct which might obstruct justice and yet not be exactly deliberate or in bad faith or

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*The substantial part of §24A reads

"No party shall suffer, and no appeal shall be dismissed, for failure of that party or the appellant to comply strictly with the requirements of section twenty-four of this chapter or of section one hundred and thirty-five of chapter two hundred and thirty-one, unless the party or appellant shall have acted deliberately with full knowledge of the consequences, or have been guilty of bad faith, or unless the non-offending party has been prejudiced; and in any case the court, in its discretion, may impose terms and costs upon the offending party. The preceding sentence shall not be a limitation upon the provisions of section twenty-four (*m*). The superior court or the supreme judicial court may, on due notice and hearing, extend the time for doing any of the acts required by section twenty-four of this chapter or by section one hundred and thirty-five of chapter two hundred and thirty-one, and the motion therefor or the court's action thereon may be made before or after the expiration of the time in question. This provision shall not permit the court to extend the time for filing the claim of appeal."

at least not easily provable as such. Some reasonable requirements which must be complied with are needed in administering justice and Section 135 of Chapter 231 was passed because of experience with previous looser methods about which there had been great complaint because of delays and complications. (See 4th Report of the Judicial Council, pp. 60–63).

We have discussed this bill (and incidentally its mate, S. 238 applying it to the probate courts) at length, because it was drawn with care, was extensively discussed in legal periodicals and because the "subject matter" of it, as well as of the two acts of 1945, is of statewide importance to the bench and bar, the litigants and the public. For reasons stated early in this report we recommend the repeal of those acts and we have found almost universal agreement among many members of the bench and bar in favor of repeal.

We do *not* recommend Senate 235 or Senate 238 for reasons already indicated.

We do, however, submit a draft act containing provisions which we believe worth trying to cover certain points which have been noted in the course of the discussion. We think the provisions are workable, that they will not cause confusion and that they may prove themselves to be practically useful.

DRAFT ACT

Section 1.

Section 24 of Chapter 214 is hereby amended by striking out the words "made before any evidence is offered" and by adding at the end of said section the words "The Supreme Judicial Court may by rule authorize and regulate the diminution or abbreviation of the evidence and of the record to such parts thereof as are really pertinent to the true issues involved in an appeal." so that the section shall read

Section 2.

"Section 24. *Report of Testimony upon Appeal.* — Upon an appeal, the testimony of witnesses who have been examined orally before a justice of either court shall, at the request of any party, be reported to the full court. The courts shall provide by general rules for some convenient and effectual means of having the same reported by the justice by whom the case is heard or by a person designated by him for that purpose. Except as provided in section one hundred and twenty-five of chapter two hundred and thirty-one, no oral evidence shall be exhibited to the full court, but the cause shall be heard on appeal upon the same evidence as on the original hearing. *The Supreme Judicial Court may by rule authorize and regulate the diminution or abbreviation of the evidence and of the record to such parts thereof as are really pertinent to the true issues involved in an appeal.*"

Section 23 of Chapter 214 as amended by Section 1 of Chapter 394 of the acts of 1945 is hereby amended by striking out the word "four" in the third line and substituting the word "ten" and by adding at the end of the section the words:

"Such a request may be accompanied by a request for action on rulings of law duly filed during the trial and in case of such additional request exceptions may be taken to any rulings or refusal to rule thereon within ten days after

notice of the action of the court thereon and a request for action on such requested rulings may be made also within ten days after notice of a report of material facts made by the court in its discretion without previous request and exceptions may be taken as aforesaid within ten days after notice of the action of the court. In either case the filing of such requests after trial for action on rulings of law shall constitute a waiver of the right to appeal under Section 19 of this chapter. In case exceptions are taken as herein provided Sections 122 and 123 of Chapter 231 shall be applicable."

so that the same shall read:

"Report of Facts — The justice of either court by whom a decree was made, if a written request by any party entitled to appeal therefrom is filed in the office of the clerk of such court within ten days after such party has been notified of the entry of the decree, shall report the material facts found by him within thirty days after the filing of the request as aforesaid or within such further time as the chief justice of such court may grant, upon written request by such justice within said thirty day period; provided, that where such decree is entered upon an order made by a justice other than the one entering the decree, such other justice shall make the report of material facts requested under this section. If no request for a report of material facts is so filed, such report shall be in the discretion of the justice. Such a request may be accompanied by a request for action on rulings of law duly filed during the trial and in case of such additional request exceptions may be taken to any rulings or refusals to rule thereon within ten days after notice of the action of the court thereon and a request for action on such requested rulings may be made also within ten days after notice of a report of material facts made by the court in its discretion without previous request and exceptions may be taken as aforesaid within ten days after notice of the action of the court. In either case the filing of such requests after trial for action on rulings of law shall constitute a waiver of the right to appeal under Section 19 of this chapter. In case exceptions are taken as herein provided Sections 122 and 123 of Chapter 231 shall be applicable."

Section 3.

Section 11 of Chapter 215 is hereby amended by striking out the word "four" in the 3rd line thereof and substituting the word "ten" so that the section will read

"Section 11 *Report of Facts* — The judge by whom an order, decree or denial was made shall report the material facts found by him, on request of any party entitled to appeal thereupon made within *ten* days after such party has notice of such order, decree or denial; otherwise such report shall be in the discretion of the judge."

Section 4.

Section 12 of Chapter 215 is hereby amended by inserting the words "as amended" so that the section shall read:

"Upon the appeal the evidence and all questions relating thereto shall be governed by sections twenty-four *as amended*, and twenty-five of chapter two hundred and fourteen and section one hundred and twenty-five of chapter two hundred and thirty-one."

Notice to Beneficiaries Before or After Probate of a Will — Resolves Chapter 32

In our 21st Report (p. 53) we submitted the following recommendation:

"It has come to our attention that in some cases the beneficiary of a charitable bequest under a will has not received notice of the bequest except by accident a considerable period of time after the allowance of the will. In Maine there is a statute (Revised Statutes of Maine 1930, c. 75, §25, p. 1160) which provides that the register of probate within thirty days after the allowance of the will shall notify by mail all beneficiaries under the will that bequests have been made to them stating the name of the testator and executor or administrator with the will annexed and that the beneficiaries may obtain copies of so much of the will as relates to them on payment of a fee of fifty cents or more if the passage is more than ten lines. We assume that it is the common practice of an executor to notify, within a reasonable time, persons named as beneficiaries, but we think that it should be made his specific duty to do so. We see no reason why this burden should be placed upon the registers of probate at the public expense. We think it should be a natural function of the executor in administering the estate."

Accordingly, we then recommended a draft act as follows:

DRAFT ACT RECOMMENDED IN 1945

"Within three months after the allowance of a will and the appointment and qualification of an executor, it shall be the duty of the executor to notify by mail the devisees and legatees named in the will whose addresses are known to him that devises, legacies or bequests have been made to them and to file in the Probate Court an affidavit showing the names of those notified and the addresses to which notices were mailed. In case an administrator with the will annexed is appointed he shall have the same duty unless it has already been performed by an executor."

By Resolves Chapter 32 the Council was requested to consider further the subject matter, "with special reference to" the following proposed legislation.

Proposed Act Referred to the Council in Resolves Chapter 32

"Chapter one hundred and ninety-two of the General Laws is hereby amended by inserting after section one B, inserted by section one of chapter three hundred and thirty-eight of the acts of nineteen hundred and forty-five, the following section: —

"*Section 1C.* Upon petition for allowance of a will notice shall be given in such manner as the court may order to all beneficiaries thereunder who have not assented in writing personally or by legal representative or a guardian ad litem duly appointed, to the allowance of the petition.

"The return of service of such notice shall contain a written statement of the names of all known beneficiaries under the will, noting the incapacity of any to act in his or their own behalf, and of the manner of service including the post-office address of each beneficiary to whom such notice was mailed.

"Such return shall be signed by the petitioner, or one of the petitioners, and sworn to by him; or shall be signed by an attorney-at-law who is an attorney of record for such petitioner or petitioners."

DISCUSSION

The present form of notice (known to lawyers as the "citation") established by the Supreme Judicial Court, issued by the register of probate on the filing of a petition for probate of a will appears on printed blanks. It is addressed "To all persons interested in the estate" and it orders publication and "mailing postpaid or delivering, a copy thereof to all known persons interested in the estate." The printed form of petition calls only for the list of surviving spouse, the heirs and next of kin. The printed form of decree recites that "the heirs-at-law, next of kin and all other persons interested, having been notified, *according to the order of the Court.*"

The forms established by the court for probate proceedings have the force of law (see *Baker* v. *Blood* 128 Mass. 543).

At the top of the citation used in Suffolk County (but not a part of the citation and not required by the Supreme Judicial Court in its vote of approval of the form), the following words are printed: "Heirs, legatees, and devisees should have notice by mail or delivery."

The varying practice as to who should be notified under the form of order in the citation quoted gives rise to the proposal in the bill referred to the Council and involves the meaning of the words "all persons interested" under the decisions of the Supreme Judicial Court.

The theory of the law thus far has been that the executor represents all taking under the will in petitioning for probate and that the heirs and next of kin, who would take if there were no will, are the persons to be notified, or to assent and even they are bound by a general notice by publication.

This legal background of practice was explained by the Court in *Bounemort* v. *Gill*, 167 Mass. 338 at p. 339–340.

"All his next of kin are interested in the question, but no one of them is a necessary party to the proceedings to determine it. The law does not require that a personal notice shall be given to any one of them. [See citations omitted]. Under the rules of court, in ordinary practice, a general notice is given which is sufficient to justify final proceedings, even if in fact it fails to reach some of the persons interested. If some of the heirs are infants, idiots, or insane persons, their disqualification does not deprive the court of its power to proceed without them. [See citations omitted]. The decree of the court admitting the will to probate is in the nature of a judgment *in rem*, which establishes the will against all the world. Any person interested may make himself a party to the proceedings by applying to the proper tribunal, and he is forever bound by the decree, whether he is in fact a party or not." [See citations omitted.]

In *Fuller* v. *Sylvia* 243 Mass. 156 at p. 159:

"Even though none of the heirs at law resident outside of this Commonwealth

appeared and even though they in truth may have been unaware of the proceeding, nevertheless the general notice was sufficient to give the court jurisdiction of the petition and to justify a final decree. *Bonnemort* v. *Gill*, 167 Mass. 338. *Wright* v. *Macomber*, 239 Mass. 98, 102."

The law and the discretionary practice under it was more fully stated by Chief Justice Knowlton in *Old Colony Trust Co.* v. *Bailey*, 202 Mass., 283 at pp. 290–291.

"It is true, as the appellant contends, that a petition for the probate of a will is a proceeding *in rem*. *Bonnemort* v. *Gill*, 167 Mass. 338. *McKenna* v. *McArdle*, 191 Mass. 96. It is also true, as a general rule, that the interests of legatees claiming under a will are properly and sufficiently represented by the executor, and, notwithstanding the dictum to the contrary in *Eliot* v. *Eliot*, 10 Allen, 357, 359, individual legatees are not entitled as of right to appear separately and become parties to a petition for the probate of a will. The representation of the estate and the conduct of the trial usually should be left to the executor. But if it appears that one legatee has important interests adverse to those of the legatees generally, or if for any reason, under the issues submitted to the jury, there are contentions that ought to be made in support of the will which are adverse to other contentions that ought to be made in support of some part of the will, it is in the discretion of the presiding justice to allow parties differently interested to appear and be heard in support of their respective contentions. In the present case the two issues presented such conditions. The executor was willing that these two legatees, whose interests were to a certain extent antagonistic, should be heard in support of their respective views. Indeed, in this court the executor's counsel was so far in doubt as to what action he should take as between the adverse contentions of these two legatees in regard to the substantive matters in dispute between them, that he presented no argument in regard to them. While we are of opinion that, as a rule, individual legatees should not be permitted to be heard in behalf of their personal interests in a proceeding of this kind, we think that, in the present case, the discretion of the court was wisely exercised. See *O'Connell* v. *Dow*, 182 Mass. 541. This exception must be overruled." See also *Crowell* v. *Davis*, 233 Mass. 137 at p. 138.

It seems clear, therefore, that the law and the practice under it treats the executor as representing all beneficiaries under the will and the heirs and next of kin who might take in the absence of a will as the only "persons interested" to the extent of being entitled to special notice by mail or delivery because they are the only ones having *a right* to be heard. While other persons are "interested" and may, generally, be recognized as such and allowed to intervene as parties if they appear they do so by leave of court, rather than as of right. One *practical* reason for this difference in practice is described by the court in *Fuller* v. *Sylvia*, 243 Mass. (already cited) at p. 160 as follows:

"The settlement of estates of deceased residents of this Commonwealth ought to go forward to a conclusion as speedily as is reasonably possible. That is of public concern in the interest of creditors, of those entitled to share in the estate

and of the Commonwealth as possibly entitled to inheritance taxes. Every practical consideration is against delay. *Riddell* v. *Fuhrman*, 233 Mass. 60, 71."

Such being the law as recognized and followed for generations should it be changed as suggested?

The draftsman of the bill writes us in support of the bill as follows:

"Because the beneficiaries under a will are entitled to object to the appointment of executor as unfit or unsuitable and to his exemption from giving surety on his bond (as well as because a residuary beneficiary might be able to prove that a legacy in the will was obtained by fraud or undue influence) all beneficiaries under the will are closely entitled to notice of the petition for probate.

"For those reasons I drafted the proposed bill for notice to parties *before* probate instead of after, which has been submitted for your consideration. I might well have included heirs-at-law — tho *they* are named in the *petition* for probate, appointment and exemption and would, of course, be cited anyway.

"The N. Y. forms are superior to ours — in that they require the names, etc., of beneficiaries to be stated in the petition for probate. Often the J.P.C. has no information as to *who* are beneficiaries; as some or all may have predeceased the testator, blood-relatives or not, leaving issue or not; and as legacies to "each grandchild who shall survive me" or some other class are common. The *better remedy* may be to require the statements to be included in the *petition*, as in N. Y., and the return on citation to state the manner of service on each, in language similar to that in the excellent partition statute."

The proposal to change what is now a permissive, but not a mandatory, practice of notice to all beneficiaries before probate raises a question of practical judgment as to the public interest in the long run. In our judgment such a change should not be made, at least, without a proviso that lack of such notice should not affect the validity of the probate. We have already referred to the probate proceeding as a proceeding "*in rem.*" That is lawyers' Latin.

In *Matter of Horton*, 217 *N. Y.* 363 *at* 368–370 the New York Court of Appeals relied on the statement of the Supreme Court of Vermont in *Woodruff* v. *Taylor* (20 Vermont, 65, 73), where that court said:

"A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing of subject matter itself, whose state, or condition, is to be determined . . . and the judgment is a solemn declaration upon the status of the thing, and . . . renders it what it declares it to be. The probate of a will I conceive to be a familiar instance of a proceeding *in rem* . . . The proceeding is in form and substance, upon the will itself. No process is issued against anyone; but all persons interested in determining the state, or condition of the instrument are constructively notified, by a newspaper publication to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money, or do any particular act, but that the instrument is, or is not, the will of the testator. . . . The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this state is concerned) just what the judgment declares it to be."

Reference was also made to the Massachusetts case of *Crippen* v. *Dexter*, (13 Gray, 330) a will probated in Connecticut was offered for probate in Massachusetts, and a son of the testator objected to evidence of the decree allowing the Connecticut probate on the ground, among others, that he had not had notice of the Connecticut proceedings. In overruling the objection, Chief Justice Shaw said:

> "The judgment of a probate court, allowing proof of a will, and admitting it to probate, is to some extent like a proceeding *in rem*, binding upon the rights of all persons interested in the property to be administered, though they are not named as parties. . . . In the present case, . . . the objection most relied on . . . was that no notice was given by the probate court of Connecticut of the time and place for the proof of this will. But it being found that by the law of Connecticut no formal notice is required, the legal ground of opposition is removed, because it would not invalidate the probate of the will there. If it be objected that such a law itself is unreasonable and ought not to be sanctioned elsewhere, it becomes a question whether such theoretic defect in the general law is likely, practically, to work injustice. A man dying, having property, usually dies within the knowledge of his kindred; the death itself is a fact of some notoriety in his neighborhood, and through the circle of his associates; proceedings for the settlement of his estate of necessity soon follow, and may be easily known to those most interested, so that actual knowledge of the proceedings will be had."

With two exceptions the statutes have not contained mandatory requirements of notice to anyone on the petition for probate. The matter has been left to rules of court. The two exceptions are Chapter 192 §1A (inserted by St. 1934 C. 113) providing that if "there is no husband, widow or heir at law . . . known to be living the Attorney General shall be made a party"; and Section 1B (inserted by St. 1945 Chapter 338 §1) that if "the surviving husband or widow . . . is incompetent by reason of insanity or minority . . . or under conservatorship, a guardian ad litem shall be appointed and made a party."

Both of these statutes by their terms recognize the existing practice of generations established by the probate forms approved by the court of requiring notice only to the surviving spouse and the known heirs (or next of kin which in Massachusetts are the same).

In our opinion the proposal in Resolves Chapter 32 to require special notice "to all beneficiaries who have not assented personally or by legal representatives or a guardian ad litem duly appointed" would delay and hold up the probate of wills and by introduction of some stranger as guardian ad litem probably stir up family squabbles to a most unfortunate extent and far outweigh the suggested need of the extended notice. The courts have always had power to appoint a guardian *ad litem* if they considered it really necessary (see Probate Rule 3 and §§1–5 and 34 and 26 of G.L. 201 which date back to the Revised Statutes of 1836 Chapter 79 as explained in the 20th Report of the Council pp. 36–37) but we believe a practice of appointing

guardians *ad litem* generally for beneficiaries and others (except under very special circumstances) to be unnecessary and unwise.

The infinite variety of provisions to benefit somebody which appear in wills is such that unnecessary questions and complications and litigation would be invited by mandatory requirements of special notice as conditions of a valid probate. It was to avoid such undesirable results that we recommended (following the practice in Maine) in our twenty-first report (quoted at the beginning of this discussion) notice by the executor *after* probate to the "devisees and legatees named in the will whose addresses are known to him."

In *Nazro* v. *Long*, 179 Mass. 451 in a writ of entry involving a question of title based on a deed ordered by a probate court on petition for a conveyance by an administratrix of land in specific performance of an agreement to sell alleged to have been made by the deceased on which there was no citation "to persons interested" issued on the petition as provided for the public P/S. c. 142 s. 1, the court, in an opinion by Mr. Justice Knowlton, held that the deed was void because under P/S. c. 142 §1 the probate court had no jurisdiction to make the decree without giving notice to "persons interested." He then added the statement by way of dictum "that such notice is expressly required by the statute and, *if it were not, the principles of natural justice would require it.*" A number of cases are then cited.

It is noticeable that this statement (referred to later by Chief Justice Rugg in *Hellier* v. *Loring*, 242 Mass. 251 at p. 252) was made by the same judge who, after he became chief justice, wrote the opinion in *Old Colony Co.* v. *Bailey* (quoted above) to the effect that the probate of a will was a proceeding *in rem* which differs in its nature from almost all other proceedings which are *in personam* in one way or another.

The distinction should be remembered, especially in view of the fact that a decree of probate in Massachusetts by a court having jurisdiction is effective outside of Massachusetts throughout the nation under the "full faith and credit" clause of the Constitution of the United States and a number of the cases already cited in this report have had to do with the problem of notice in connection with the question of jurisdiction wherever the will is probated first. It is important, therefore, to all Massachusetts testators and their beneficiaries and the public that the legal question of jurisdiction of a Massachusetts court to admit a will to probate so that it may also be admitted when necessary in other states, should be simple and not be complicated by any requirement of notice other than the present requirements by any provision which might in any way raise a question as to the jurisdiction of the court in allowing a will.

In *Crowell* v. *Davis*, 233 Mass. 136 the court held that a legatee under a prior will which had been revoked by the later will was a person "aggrieved" and, therefore, entitled to appeal from a decree

admitting the later will to probate, thus recognizing that a legatee under a revoked will may be "interested" but it also establishes the fact that the words "persons interested" have very properly different meanings when applied to the facts. Certainly no one would suggest that legatees under a revoked will were entitled to special notices from the petitioner for probate of the later will. Such a requirement would have absurd results as some people keep on making a succession of wills and they have a right to do so and nobody who is a beneficiary in a revoked will has any rights whatever. In some cases when such beneficiaries happen to know that there was an earlier will they try to fight the later will, but that is simply the result of their accidental knowledge. It does not mean that every competent testator who honestly revokes a will is to have his will subjected to attacks by persons mentioned in some revoked will or that it should be the duty of the petitioner who happened to know of one or more earlier revoked wills to mail a citation to every revoked beneficiary. A will is a peculiarly private document until the testator dies. The general published notice is legally sufficient to cover all the varieties of "interest."

In view, however, of the differing practice in different counties as to who must be notified on a petition for probate, we believe a more uniform directory, but not mandatory, practice should be established but we do not recommend legislation because the matter has always been within the regulatory powers of the Supreme Judicial Court and the probate courts.

Recommendations to the Supreme Judicial Court

We, therefore, recommend to the Supreme Juducial Court the adoption by rule of the recommendation in our 21st Report as to notice *after* probate and recommend also to the Supreme Judicial Court the consideration of the following draft-rule as to notice *before* probate:

DRAFT PROBATE RULE

1. The form of citation issued on the filing of a petition for probate of a will is hereby amended by striking out the word "persons" in the order for mailing and delivery and substituting the words "heirs and next of kin and the surviving husband or wife" so that the same shall read:

"and by mailing post-paid, or delivering, a copy thereof to all known heirs and next of kin and the surviving husband or wife interested in the estate fourteen days at least before said return day."

2. In addition to the notice ordered in the citation on a petition for probate of a will it shall be the duty of the petitioner to mail post-paid or deliver a copy of the citation to the living adult devisees and legatees named in the will at least fourteen days before the return day and to file in the probate registry an affidavit showing the names of those thus notified and the addresses to which notices were mailed, but the jurisdiction of the court to proceed and to enter a binding decree admitting the will to probate on proof of service as ordered in the citation shall not be dependent upon the performance of this duty.

TAX RECEIVERS (*Resolves Chapter 6*)

At the legislative session of 1945 a bill numbered H. 1129 of that year was introduced to amend Chapter 60 of the General Laws by inserting five new sections, the main purpose of which was contained in the first of these proposed sections as follows:

> "*Section 85A.* Upon the entry of any such action involving taxes on property, *other than a dwelling house*, the court in which the action is entered shall, upon motion of the collector, appoint a receiver of the property of the defendant against which the tax was assessed, with full authority to take charge of all of such property and to collect, get in and take over all the rents or other income thereof and to hold and expend the same in accordance with the orders of the court."

By Resolves Chapter 12 of 1945 the subject matter of this bill was referred to the Council. In our 21st Annual Report we discussed the subject and did *not* recommend the bill. We also called attention to the fact that a protest against the bill had been received from the Boston Real Estate Board and shortly before the filing of the last Report, a communication was received from the Massachusetts Federation of Taxpayers' Associations which, while protesting against H. 1129, suggested other drafts of legislation to provide for tax receiverships, based on the practice in New Jersey and containing references to the laws in Illinois, Ohio, Tennessee and New York. As there was not time to consider this communication, in the last report we suggested that the matter be postponed until this year. Accordingly, by Chapter 6 of the Resolves this year the Council was requested to investigate the subject further.

The communication of the Federation of Taxpayers' Associations, while objecting to the bill of 1945, suggested that

> "A procedure under which a city or town may levy upon the revenue of income-producing property to collect delinquent taxes would be a desirable addition to the Massachusetts Tax laws. . . ."

Two alternative drafts of legislation were suggested, one a plan under which the city or town treasurer after real estate is taken for taxes, and after five days' notice to the owner, could petition the district court to be appointed receiver *ex officio* to collect out of the rents and other income the taxes "and all incidental charges and fees together with the costs and expenses of the receivership." The city solicitor or town counsel would act as attorney for the treasurer and the treasurer and his counsel would serve "without any additional fees or compensations." Where there was a first mortgage the treasurer might appoint the first mortgagee as receiver's agent. In other cases, "the person in charge or management of the real estate" might be so appointed. Such appointee would be subject to removal upon notice in writing by the court and the court might then desig-

nate another person. Any agent thus appointed "shall be bonded in whatever amount the court deems reasonable and shall be entitled to such compensation as the court may allow, provided, however, that such compensation shall in no case exceed five per cent of the gross yearly rent and other income of such real estate." The court on *ex parte* application by the treasurer could authorize contracts and payments "necessary for the repair, maintenance and operation of the real estate, provided that such payments shall be deemed administration expenses of the receivership and shall be met out of the rent and other income of such real estate." When the taxes, etc., have been paid, the treasurer could apply for a discharge as receiver and "surplus moneys, if any" should be paid over to the owner.

The draft also provided that the treasurer, at any time during the pendency of a mortgage foreclosure suit, might intervene by petition for an order for the payment of delinquent taxes and incidental charges and fees.

We are not clear as to the meaning of this last suggestion in Massachusetts, as most foreclosures are under a power of sale without court proceedings. Perhaps the suggestion was intended to allow a petition to be brought after a notice of foreclosure sale and before the sale — a proceeding which would probably spoil any sale.

Finally, the draft provided that such receivership proceedings "shall not apply to real estate, occupied by the owner as his residence and from which he derives no rent, or to farm property occupied by the owner thereof and from which he derives no rent."

The receivership remedy would be in addition to all other remedies provided by law.

It is obvious that this proposed draft attempts to reduce so far as possible, the opportunity for lawyers' fees, receivership fees, etc., which would have been open under the bill of 1945 which has been referred to. It is noticeable, also, that this proposed bill, like the bill of 1945, would not apply to property used as a residence nor to farm property, unless rented. The question of discrimination, therefore, against commercial property in the collecting of taxes, referred to on p. 26 of our 21st Report would arise.

The study of the federation, in reference to such receiverships by court action, calls attention to the present New Jersey receivership law, which is printed for convenient reference in appendix C, p. 96 of this report, and suggests, as the better plan, the following draft for automatic receivership by the treasurer without any court action:

THE FEDERATION OF TAXPAYERS' ASSOCIATIONS' SUGGESTED DRAFT OF A TAX RECEIVERSHIP LAW WITHOUT COURT ACTION

"Chapter sixty of the General Laws is hereby amended by inserting after section thirty-seven, as most recently amended, the following new section:

"Section 37A. Whenever a city or town shall have purchased or taken real estate for payment of taxes, such city or town shall be entitled to immediate possession of such real estate and to all the rents and other income collected while the holder thereof, until redemption. All rents and other income collected by such city or town shall be credited on the delinquent and subsequent taxes, assessments and other municipal charges assessed against such real estate. When the total amount due for the same, including all incidental charges and fees, has been paid, such real estate shall be redeemed from the tax sale.

"Whenever a city or town shall be entitled to take possession of any real estate pursuant to the provisions of this section, the treasurer, acting on behalf of such city or town, may take possession of said real estate and collect the rents and other income thereof for such city or town. In all cases where the real estate in question is encumbered by a first mortgage and such mortgagee is a proper person and is willing to accept appointment, the treasurer may designate such mortgagee as the treasurer's agent to collect the rents and other income from such real estate and manage the same. In all other cases the treasurer may designate the person in charge or management of such real estate as the treasurer's agent to collect the rents and other income from such real estate and manage the same. Such mortgagee or other person shall account promptly to the treasurer for the rents and other income so collected, and the treasurer shall account promptly to the city or town for the rents and other income so collected.

"No fees shall be allowed to such treasurer from the rents and other income collected from such real estate but he shall be allowed such expenses in connection with the operation and management thereof, including proper compensation to said agent, as the city council or board of selectmen, as the case may be, may appropriate.

"Such city or town and its officers, agents or employees shall not be liable or accountable to the owner or to any other person having an interest in such real estate for failure to collect rents or other income therefrom but such said officers, agents or employees shall remain so liable and accountable to such city or town. Such city or town and its officers, agents or employees shall not be liable for injury to said real estate or to the person or property of any other person from the use of the real estate for the purposes of this section, any law to the contrary notwithstanding."

As to this draft, under which the tax collector becomes a receiver automatically, the following statement of the city treasurer of Wildwood, New Jersey, describes its operation in that state:

". . . The Collector of Taxes has only upon his own initiative to move to take possession of the delinquent tax property. The confirming resolution of the governing body should be of course adopted. This can probably be done in a blanket resolution or all embodying resolution granting the Collector of Taxes authority to move in such instances as in the opinion of the Collector warrant a move. In practice this city does this: It appearing that the title owner of the property is failing to make any payments on the delinquency, the Collector writes a letter of notification of intention to the tenant that the Collector is taking possession of the property under R.S. 54: 5–53.1 and that rents thereafter are to be paid to the Tax Office. The title owner receives a similar letter. Any attorney or agent of the owner may receive a similar letter as courtesy to him in behalf of his client the title owner. Thereafter a lease is prepared as between the current tenant

and the Collector of Taxes as Receiver. Rental payments are taken in accord with the terms of the lease and receipt of the then Receiver issued. The act absolves the governing body or the municipal officials from responsibility for injury to the property. Hence any repairs required may or may not be made — probably not as a matter of fact — but all rents applied in direct reduction of the delinquent taxes. . . .

"Under the present act as soon as the Collector determines that the city can obtain some cash from a property he moves. Having taken possession, proceedings are quite likely to be instituted immediately for foreclosure of the tax title lien in Court of Chancery. Because, in New Jersey, a final decree in Chancery whereby the city will become the owner of the property takes from six months to a year or longer depending upon the ability of the attorney to discover the persons in interest, it will readily be seen that such proceedings can be stepped up and the city obtain, not alone money to apply on the delinquent tax, but also time in obtaining the title to the property. The city under the present act also recovers some cash because it receives the rents plus the out-of-pocket savings ($80 average cost under the former Receivership proceedings). These two sources, cash income plus saved-costs, help toward the final costs of the foreclosure fees. The city's costs of foreclosure are now set at $150 per property where the foreclosures are in batches of ten or more.

"The city does not regard the present law as a device of threat because delinquent taxpayers not having paid taxes before are not likely to be alarmed by a letter notice of intention. Beyond that it may aptly be that a property is without a visible owner and a tenant simply occupies the premises and pays rent to no one. This city has had two cases of that description probably because the owner died or simply disappeared. Therefore the city has been able to make effective financial use of the act all things considered.

"Under the present act none of the annual gross income of properties in the Receivers' hands goes toward fees or expenses because the Collector of Taxes is presumed to have that phase of tax property as just another duty that goes with the job. The act does provide that he may be compensated for management.

"The New Jersey Law imposes much mandatory duty upon the office of Tax Collector wherein a Tax Collector moves under the law and not as a result of any dictum, direction or authority of the governing body. Hence the present law has provided some freedom to that official in the discharge of his duties, through a lessening of record keeping, and more latitude in operation and acquisition of improved property which is beneficial to the city taxpayers at large without interference from a so-called political favor standpoint. It has lessened the out-of-pocket costs to which have heretofore (before the enactment of the present law) been a charge against the operating budget of the municipality."

A copy of these suggestions of the federation of Taxpayers' Association with the explanatory memoranda and reference to the literature of the subject referred to in our 21st Report was submitted to counsel for the Boston Real Estate Board in order that that organization might submit such information and argument bearing upon the question as it might wish. Under date of August 14, 1946 we received from counsel, on behalf of the Boston Real Estate Board, the following statement:

OBJECTIONS OF THE BOSTON REAL ESTATE BOARD TO THE PROPOSED LEGISLATION

"We believe that the appointment of a receiver for commercial property, so-called, is unnecessary, undesirable and is discriminatory. Any proposal which would expedite the collection of taxes which may be unjustly and improperly levied on commercial property would encourage overassessment. The taxpayer must pay the taxes in full to maintain an appeal to the Appellate Tax Board, except in those cases where for cause shown he need only pay one-half the tax, and must pay the taxes in full before obtaining a trial.

"As recently as April 11 last the Press carried reports of sales by the City of Boston which indicate the prevalence and seriousness of overassessment. According to reports in the Boston papers five parcels of real estate in downtown Boston which were assessed for a total of $1,555,000, were sold at public auction for only $728,500. Such a sale is excellent evidence of value. At this auction downtown property brought only 46% of its assessed value.

"A comparatively modern building at 209 Washington Street, at the head of State Street, brought only $279,000. This very property was assessed for $700,000 or more than twice its value. Another property assessed for $500,000 was purchased for $225,000. A building at 9 Park Street assessed for $175,000 sold for $62,000.

"Since this sale downtown commercial property assessments have increased some 57 million dollars. It is a situation such as this that compels opposition to any proposal which will give a city a strangle hold on real estate which is already over-assessed.

"Adequate remedies for the collection of taxes on real estate exist at present and if the cities and town pursue them diligently then such legislation is unnecessary.

"Chapter 60 of the General Laws affords remedies by way of lien, and levy by sale (section 37); distress and imprisonment (section 19); distress and sale of personal property (section 24); arrest and imprisonment (section 29); taking of real estate (section 53); and suit by the collector for any tax due and unpaid after commitment to him and, as amended, he need no longer wait three months (section 35).

"The remedy which is most commonly exercised is that of taking or sale of the real estate which is usually followed by appropriate proceedings in the land court to foreclose the right of redemption. These proceedings may not be commenced until two years after the sale or taking and delays frequently occur in these proceedings. Thus three or four years, and in some cases more time may elapse befor the right of redemption is foreclosed. It is during this period that proponents of such legislation claim that some taxpayers 'milk' the property.

"We believe that cases of 'milking' are relatively few. But even if the practice exists the municipality has ample security for the payment of taxes. The land is security for the unpaid taxes and charges on which the sale or taking is originally based and for all subsequent taxes pending redemption or foreclosure of the right to redeem.

"Assume please a case of delinquent taxes with a tax rate of $50. For every $50 owed there is $1,000 worth of security. Further, the value of this security has been fixed by the municipality itself, through its assessors. If the assessment is $100,000, the tax is $5,000. If it is not paid and the property is sold or taken and five years elapse before the right of redemption is foreclosed an additional $25,000 or a total of $30,000 is due. There is still $100,000 of security as valued

and appraised by the municipality itself. Surely the property should be worth three-tenths of its assessed value. It is inconceivable that any reasonably diligent pursuit of existing remedies could result in the unpaid taxes equalling or exceeding the value of the security. Should such a case occur, it could result only from an outrageously valuation for which there can be no excuse and which should not be encouraged.

"The appointment of a receiver might well disturb the relationship of landlord and tenant and employer and employee, subject the property to the additional expenses of the receivership and deprive the already overburdened real estate taxpayer of any reasonable opportunity to salvage his investment."

A copy of this reply was sent to the representative of the Federation of Taxpayers' Associations, which rested its case on its communication of 1945. We have tried to summarize fairly the reasons on both sides of the subject for the public and the legislature, substantially as they were presented to the Council.

We do not recommend either of the drafts submitted and we are not convinced of the advisability of any plan for tax receivers.

While some of the details of the drafts are better than those in House 1129 of 1945 in attempting to reduce somewhat the fees and other forms of expense, we do not think it would be wise to introduce such proceedings into the seventy-three district courts in the Commonwealth. No evidence has been called to our attention as to the extent of the alleged practice of "milking" property by the owner who is delinquent in his taxes before dumping it on the city or town. We find it difficult to believe that it is so common as to justify subjecting every other taxpayer who may be struggling to *salvage* his property to the ruinous possibilities, or probabilities, of a receivership.

The quoted statement of the treasurer of the City of Wildwood does not convince us in favor of the proposal. We are not familiar with the assessment, and other tax, practices in New Jersey, but, in Massachusetts, as stated in our last Report (pp. 25–26) the question would seem to be whether any receivership plan can be devised.

". . . to prevent what is alleged to be the 'milking' of property by an owner, while the taxes are unpaid, without increasing the burden on real estate by assisting in the 'milking' of the property, through over assessments by destroying, or seriously interfering with, any efforts of honest owners to improve the property or to keep it in repair, by interfering with the management causing tenants to leave who may not care for public authorities as landlords, and, thus, in a variety of ways, depreciating the market value of the property beyond hope of recovery. . . . While the municipalities should get their taxes, it is also important that land owners who are not trying to 'milk' the property, but to save it, should have some consideration and it is a serious question how far the tax gatherer should be given machinery for 'breaking' the taxpayer and the property."

In view of these considerations and other comments in regard to the matter in our 21st Report the proponents of receivership legisla-

tion have not, in our opinion, overcome the objections to such proceedings from the point of view of the public interest and of those real estate owners who are not trying to "milk" their property but are trying and often struggling to salvage it.

Report on House 949 as to Divorce

By Resolves Chapter 25 a report was requested on House 949 which would add to the specified causes of divorce in Section 1 of Chapter 208 of the General Laws, after the word "impotency" in the second line the words:

> "the commission with any person, including the libellant, of any act punishable under sections thirty-four and thirty-five of chapter two hundred seventy-two."

Section 34 provides: "Whoever commits the abominable and detestable crime against nature, either with mankind or with a beast, shall be punished by imprisonment in the state prison for not more than twenty years." Section 35 provides: "Whoever commits any unnatural and lascivious act with another person shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years."

An examination of the statutes of the other states shows that such cause is not specifically included as a basis for divorce except in Alabama and North Carolina. In these statutes the provision is as follows: in Alabama, "the commission of the crime against nature whether with mankind or beast, either before or after marriage"; in North Carolina, "if any person shall commit the abominable and detestable crime against nature whether with mankind, or beast."

The causes for divorce in Chapter 208, Sections 1 and 2 (inserted by St. 1937, Ch. 76) include imprisonment for five years or more. *Conviction and Sentence* under §34 *if for five years or more for the acts of* "sodomy and buggery" which constitute the more generally recognized" crimes against nature" (see 48 "American Jurisprudence" 549 et seq.) are now within the statutory causes of divorce. But if the sentence is for less than five years, or if there has been no criminal *conviction*, the cause of divorce does not appear to arise under the opinions in *Bailey* v. *Bailey*, 97 Mass. 495, and W-v. W-141 Mass. 695. In 1887 "any unnatural and lascivious act" was made a crime (see Section 35 above quoted) punishable by not more than five years in state prison or in jail or the house of correction for not more than two and one half years. Just what acts are covered by the words "any unnatural and lascivious act" are not specified, but two convictions have been sustained in *Com.* v. *Delano*, 197 Mass. 166 and *Com.* v. *Whitcomb*, 277 Mass. 27, without specifically describing them

in the opinions. Under this section 35 only a conviction followed by the maximum penalty of five years in state prison would provide cause for divorce.

If the disgusting facts exist under Section 34 we see no reason why a husband or wife should be denied a divorce until a *conviction* and five-year sentence are obtained. It seems strange that, while adultery has been generally recognized as a cause, this other business has not been so recognized, although in another jurisdiction it was found to constitute extreme cruelty. (See 9 Harv. Law Rev. 360). We believe it should be specifically recognized as proposed in House 949.

As to the "unnatural and lascivious acts" covered by §35, the record in the case of *Com.* v. *Delano* shows facts too disgusting to describe. The case of *Com.* v. *Whitcomb*, was a case of "lascivious" facts of an incestuous character but not amounting to incest. The possible variety of sexual acts covered by the general words "unnatural and lascivious" raises the question whether so general a description of all of them by mere reference to Section 35 should be made specifically a cause of divorce. As a practical matter we should suppose that the words "cruel and abusive treatment" might reasonably be held to cover the more serious and habitual acts if known, even if not committed in the presence of the libellant, and we surmise that, in all probability, some judges so find. We suggest that, instead of an additional specified cause of divorce, by general reference to §35, Section 1 of chapter 208 should be amended by specifically providing that, under the clause "cruel and abusive," treatment the court may consider the commission, or continuance, of acts within §35 and their seriousness. Accordingly we recommend the following:

DRAFT ACT

Section 1 of chapter 208 of the General Laws is hereby amended by adding at the end thereof the words:

"or the commission on an act or acts punishable under Section 34 of Chapter 272. In considering an allegation of 'cruel and abusive treatment' as an alleged ground for divorce the court may include consideration of the commission, or continuance, of acts within Section 35 of Chapter 272 and their seriousness, when known to the libellant, as material to the question of proof of the alleged ground."

Note

We are informed by the petitioner that the reason for the introduction of the bill was the fact that a number of lawyers had spoken to him about the matter and thought that the acts referred to should be specified as grounds for divorce.

House 159 — Requirement of Hearing in Superior Court Before Filing of Libel for Divorce

By Resolves Chapter 22 a report was requested on the subject matter of House 159, which would amend Chapter 208 of the General Laws by inserting the following Section 1A, etc.:

"Section 1A. No petition or libel for divorce shall be brought until there has been a hearing before a judge of the superior court who has certified that the bringing of the libel is justified and in the public interest."

We do not recommend the passage of this bill. For years the Superior Court and the Probate Courts have had concurrent jurisdiction in divorce matters. The probate courts have more to do with domestic relations than other courts. Petitions for separate maintenance and custody of children guardianship, adoption, etc., have always been in the probate courts. They are local county courts easily accessible and as shown by the statistical tables in our annual reports almost all the divorce cases have been brought in the probate courts.

The proposed bill would provide for two trials in every divorce case, first in the Superior Court and next in that court or in a probate court. We do not recommend such duplicated procedure.

House 440

By Resolves Chapter 17 a report was requested on this bill proposing the following

An Act relative to proof of lack of due care or proof of contributory negligence in actions for recovery of consequential damages.

Section eighty-five of chapter two hundred and thirty-one of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding at the end thereof the following new sentence: — In actions for consequential damages the person injured or killed or the person chargeable with his conduct shall be presumed to have been in the exercise of due care and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant.

This bill extends the advantages of the due care statute, so called, to one who is obligated by law to pay for medical care and attention, etc., on account of the injuries sustained by another by reason of the negligence of the defendant. The usual situation is where a husband sues to recover the cost of medical treatment resulting from injuries to his wife, or where a parent seeks recovery of medical expenses resulting from injuries to a minor child. In only very rare instances is the action for recovery of consequential damages tried apart from the case of the wife or child for direct injuries. Chapter 372 of 1939 now allows the husband or parent consequentially injured to join as

party plaintiff in the original action of the wife or child. The present due care statute applies to the physically injured person but not to the person consequentially injured. This situation requires the Court to instruct the jury that in one case the burden of proving contributory negligence is on the defendant, while in the other case the burden of proving lack of contributory negligence is on the plaintiff. This makes for confusion and bewilderment. In actual practice both plaintiffs usually prevail or lose together. The reasons for enacting the original due care statute would seem applicable in actions for consequential damages. Death or serious injury plus the absence of witnesses might result in a failure of justice. More often than not the person seeking recovery for consequential injuries is not a witness to the accident. The enactment of the proposed statute would simplify trials and, in its practical application would not be unduly harsh on defendants. We recommend passage of House No. 440.

House 951 — Relative to Medical Examinations in Personal Injury Cases

By Resolves Chapter 18 this bill was referred to the Council. It would add to G. L. Chapter 233 a new section as follows:

> *Section 23B.* If a person injured in an accident unreasonably refuses to submit to one medical examination to be made in the presence of his physician after a written request therefor is made by or on behalf of a person from whom damages have been claimed, such refusal shall be admissible in evidence and a proper subject for comment at the trial of any action brought to recover damages for bodily injuries, including death, or consequential damages, resulting from such accident. If the injured person submits to such examination, the person by or on behalf of whom the same was made shall, within ten days after such examination and at least three days prior to such trial, furnish the injured person, or his attorney, a true and complete copy of the report of the examining physician. If such copy is not furnished as herein provided, the said physician shall not be allowed to testify in any such action and the failure to furnish such copy shall be admissible in evidence and a proper subject for comment at the trial.

It is doubtful if the legislation proposed by this bill is necessary in view of the present practice. It is permissible for a defendant in the trial of a tort action to introduce evidence showing that the plaintiff refused to submit to a medical examination prior to the trial and this evidence is a proper subject for argument during the trial. Likewise, it is permissible for a plaintiff to produce evidence to the effect that the defendant requested and obtained a medical examination of the plaintiff and if the defendant fails to produce the physician who made the examination, it is a proper matter for comment and argument to the jury.

The proposed legislation seeks to compel a defendant to furnish to the plaintiff or his attorney a complete copy of the report of the ex-

amining physician within ten (10) days after the examination is made and at least three (3) days before trial. The penalty for failure to furnish a copy would prevent the defendant from producing the doctor who made the examination for the purposes of testifying at the trial, and the fact that an examination had been made, etc., would be a proper subject for comment at the trial. The time element might prevent a defendant who was acting in complete good faith, from producing a doctor to testify since it is entirely possible that the defendant or his insuror would not actually receive the medical report from the examining physician within ten (10) days after the examination was made and in that event the defendant might be penalized for a situation over which it had no control. Furthermore, there is no provision in the Act which would allow a defendant to obtain a copy of a report from the plaintiff's physician. It would seem only fair that if the proposed Act is to become law, it should work both ways, nor is there any assurance that the plaintiff will have a medical report from his own physician.

This legislation would have a tendency to prolong a trial and cause additional expense to both parties in that each might attempt to further corroborate the testimony of the attending and examining physicians by the production of expert witnesses, so-called. It is believed this would cause further confusion in the minds of the jury in attempting to determine the real facts with respect to an alleged injury. We do *not* recommend House 951.

House 952 — Relative to Documents Used by a Witness to Refresh Recollection

This bill was referred to the Council by Resolves Chapter 18. It would amend G. L. Chapter 233 as previously amended by St. 1945 Chapter 945 Section 1 by adding the following new section.

> *Section 23B.* A party to any trial of any cause of action, suit in equity, or hearing before any court, board or commission may, upon request, see any document, paper, statement, or other memorandum which the witness has testified he has used to refresh his recollection whether that document, paper, statement, or other memorandum has been used in court during the trial or prior thereto; and the fact that said party requests to see the said document, paper, statement, or other memorandum shall not make the said document, paper, statement, or other memorandum admissible in evidence unless the party calling for the same uses it for the purpose of cross-examination of said witness.

There appears to be no need for the legislation described in the above bill. It attempts to circumvent the present rule relative to calling for and the production of documents, memoranda, etc. The proposed act uses the word "request" but in actual practice a request to see a particular document would vary little, if any, from a demand to produce. This act seeks to obtain a document or memorandum

for the purposes of examination from the opposing party and avoid the consequences of said document then being introduced in evidence by the party from whom it was obtained. The act does provide that if the document or memorandum were used for the purposes of cross-examination, it would then become admissible in evidence. The law applicable to this situation today is very clearly set forth in the case of *Leonard* v. *Taylor* 315 Mass. 580 Et Sec. This case upholds the rule established in *Clark* v. *Fletcher* 1 Allen 53–57.

In the Leonard case 582, the court used the following language:

> "We incline to believe, however, that there are reasons behind the rule which were not fully stated in *Clark* v. *Fletcher*, and we suspect that critics may not fully appreciate the disastrous effect upon a jury in a perfectly good case or defence of a bold and dramatic demand by opposing counsel for the production of a document at some critical moment of the trial. It may be impossible to refuse without creating an impression of evasion and concealment, and even if the demand is acceded to it may be practically impossible to prevent the same impression without showing the document itself to the jury. It is our belief that if there is sharp practice anywhere it is more likely to be found on the side of the demanding party than on that of the party upon whom the demand is made, and that if unfortunate consequences follow, the demanding party should be the one to suffer them. He can commonly avoid them by utilizing his opportunities for discovery before trial or by limiting his demand to that which is competent."

Further on in the decision the following language is used:

> "The right of an opposing party to examine any paper used to refresh the recollection of any witness on the stand at the trial is beyond doubt. But to extend this right to every paper seen by a witness in the preparation of the case before trial is a different matter. Such an extension of the principle might turn every trial into a fishing expedition and place a powerful weapon in the hands of an unscrupulous attorney."

If this new section were enacted into law it would tend to allow an unfair advantage without the consequences that should reasonably follow when a demand to produce a certain document is made, and consequently we do not recommend its passage.

Operation of Motor Vehicles at Grade Crossings (House 259 and House 260)

By Resolves, Chapter 411 the Judicial Council was asked to report on House Bills numbered 259 and 260, both relating to the operation of motor vehicles at grade crossings. House No. 259 would amend Section 15 of Chapter 90 by striking out the word "cautiously" and inserting in place thereof the words "with due care." This section now requires that every person operating a motor vehicle upon approaching a railroad crossing at grade to "shall reduce the speed of the vehicle to a reasonable and proper rate, and shall proceed cautiously over the crossing."

House No. 260 would amend the law to provide that the operator of the motor vehicle in such cases shall be presumed to have operated the vehicle in compliance with Section 15 of Chapter 90 and that violation of such section shall be an affirmative defence to be set up in the answer and proved by the defendant. We believe this to be the settled law of the Commonwealth at the present time (*Klegerman* v. *New York, New Haven & Hartford Railroad*, 290 Mass. 268, 274, 275, and *Copithorn* v. *Boston and Maine Railroad*, 309. Mass. 363). These cases decide respectively that in an action under Section 232, Chapter 160, for failure to sound the statutory signals, and at common law for negligence, the burden of proving violation of Section 15 of Chapter 90 is on the defendant.

We do not see anything to be gained by substituting the words "due care" for the word "cautiously" in Section 15 of Chapter 90. Violation of this statute, which is penal, would still be "acting in violation of the law" under Section 232 of Chapter 160, and proof by the defendant of such violation indirectly contributing the injury would bar recovery as at present. In our opinion substitution of the words "due care" for cautiously would not work any change in the kind of conduct the law requires. Due care is a relative term and denotes the degree of care, vigilance and forethought which, in the discharge of the duty then resting on him, the person of ordinary caution and prudence ought to exercise under the particular circumstances." (Rugg, C. J. in *Altman* v. *Aronson*, 231 Mass. 588, 591.)

The barring of recovery for violation of a penal statute, where it is shown that the violation caused the result the statute was designed to prevent, is not peculiar to actions for damages arising out of grade crossing accidents. It is a rule applicable to all actions for negligence (*Patrican* v. *Garvey*, 287 Mass. 62.)

In respect to Section 15 of Chapter 90, the Supreme Judicial Court has said that: "The statute is founded upon a rule of public policy designed to promote the general welfare of travelers upon railroads as well as upon ways." *Kenney* v. *Boston & Maine Railroad*, 301 Mass. 271, 276. *Fortune* v *New York, New Haven & Hartford Railroad*, 271 Mass. 101, 105.

We believe that neither of these bills would work any change in the existing law and, therefore, do not recommend them.

Criminal — Jurisdiction of District Courts, House 698

House 698 which we are asked to report upon under Resolve 13 of 1946 would strike out the present section 26 of Chapter 218 of the General Laws (Ter. Ed.) as most recently amended by Chapter 365 of the Acts of 1938, and insert a new section. The only change which would be made by the new section to be inserted as contained in H. 698 would be to take away jurisdiction of the district courts of

"the crimes mentioned in Sections 18 and 19 of Chapter 266" and give the district courts jurisdiction instead of the crimes mentioned in Section 16.

Section 16 relates to the breaking and entering in the night time of a building, ship or vessel, with intent to commit a felony and provides for a penalty of not more than twenty years in state prison or not more than two and a half years in a house of correction.

Section 18 provides that: "Whoever in the night time enters a dwelling house without breaking, or breaks and enters in the daytime a building, ship or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years."

Section 19 provides that "Whoever breaks and enters, or enters in the night time without breaking, a railroad car, with intent to commit a felony, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in the house of correction for not more than two years."

The position of the Judicial Council, after giving careful consideration to this bill, is that we do not favor it. We do not believe that district courts should be given jurisdiction of crimes involving a maximum penalty of twenty years in state prison.

Mental Hospital Records, House 63

Chapter 291 of the Acts of 1945 permitting the inspection of hospital records (kept under the provisions of Section 70 of Chapter 111 of the General Laws Ter. Ed.), by the patient to whom they relate, or by his attorney upon written authorization from the patient, and requiring the furnishing of a copy of the record upon the request of the patient and the payment of a reasonable fee, includes the records of hospitals under the Department of Mental Health. As we understand House 63, which we are asked to report upon under Resolve 14 of 1946, the bill is designed to exclude from the operation of this law hospitals under the control of the department. It is readily understandable that in many cases it would be extremely inadvisable to allow a mental patient to inspect his record or allow him to have a copy of it. The law still would provide for furnishing the patient with a copy of such record upon judicial order, whether in connection with pending judicial proceedings or not. We recommend the passage of House 63 with this proviso, that there be stricken out in lines 43, 44 and 45 of said section 70 as amended, the words "except in the case of records of hospitals under the control of the department of mental health." This would

permit the Department of Mental Health, as well as the head of any other department with hospitals under his charge, to order the furnishing of such copies upon payment of a reasonable fee. The law relating to hospital records would then read as follows: the new words being printed in italics.

Section 70. Hospitals supported in whole or in part by contributions from the commonwealth or from any town, incorporated hospitals offering treatment to patients free of charge, and incorporated hospitals conducted as public charities shall keep records of the treatment of the cases under their care and the medical history of the same. Such records may be made in handwriting, or in print, or by typewriting, or by the photographic or microphotographic process, or by any combination of the same. Whenever pre-existing hospital records shall have been photographed or microphotographed and the photographs or microphotographs shall have been duly indexed and filed by the hospital, the person in charge of the hospital, upon notifying in writing the supervisor of public records referred to in chapter sixty-six, may destroy the original records so photographed or microphotographed, and such photographs or microphotographs shall have the same force and effect as the original records from which they were made. Such records and similar records kept prior to April twenty-fifth, nineteen hundred and five, shall be in the custody of the person in charge of the hospital. Section ten of chapter sixty-six shall not apply to such records; provided, that, *except in the case of records of institutions under the control of the department of mental health*, such records and similar records kept in the custody of the person in charge of the hospital may be inspected by the patient to whom they relate, or by his attorney upon delivery of a written authorization from the said patient, and a copy shall be furnished upon his request and payment of a reasonable fee; and provided, further, that upon proper judicial order, whether in connection with pending judicial proceedings or otherwise, or, upon order of the head of the state department having supervision of such hospital, and in compliance with the terms of said order, such records may be inspected and copies furnished on payment of a reasonable fee.

House 1883 — Release on Bail in Certain Cases

By Resolves Chapter 42 a report was requested on this bill which would amend G. L. (Ter. Ed.) Chapter 276 by adding a new section as follows:

Section 57A. A person held in custody for his appearance in court or before a trial justice, whose bail has already been fixed, shall be released by the officer for the time being in charge of the place of custody upon his executing a recognizance running to the clerk of such court or such trial justice for such appearance, accompanied by a deposit of the amount of such bail in cash, or in negotiable United States government bonds, or in a bankbook of a savings bank or the savings department of a trust company or national bank duly assigned to such clerk or justice. A person held in custody charged with an offence not punishable by imprisonment for more than one year whose bail has not been fixed may be so released upon executing such recognizance for his appearance in court or before a trial justice as required by the order under which he is held accompanied by such

deposit amounting to not less than one hundred dollars in any of the forms aforesaid. Any recognizance and deposit received under this section shall be deposited with such clerk or trial justice by such officer as soon as may be.

SECTION 2 would amend Section fifty-eight by striking out the words "the preceding section" and inserting the words: — section fifty-seven,— so as to read as follows: — *Section 58.* If the person is committed without an order fixing the amount of the recognizance, he shall not be admitted to bail *under section fifty-seven*, until reasonable notice of his application has been given to the officer by whom he was committed, or a hearing has been given to the officer in whose custody he is held; and if committed with such order, he shall not be admitted to bail, except by the supreme judicial or superior court or by a justice of either court, for a less amount than is required by the order or by an order of either court, or of a justice thereof, revising said amount.

By Section 57 bail may be taken by a justice or clerk of any court having criminal jurisdiction or by a trial justice, a standing or special commissioner, or a master in chancery, subject to the limitations set out in Section 59, and by Chapter 218, Section 26, justices of the peace in certain towns within the judicial district of a district court.

Section 57 provides that no person offering himself as surety shall be deemed insufficient if he deposits money of an amount equal to the amount of bail required of him in (the) recognizance or certain securities instead of cash. It is now proposed by H. 1883 to allow the person held in custody to obtain his release by depositing with the officer in charge of the place of custody, cash or securities equal in amount to the recognizance already ordered, and if no amount has been set, then if he is charged with an offence punishable by imprisonment for not more than one year, a deposit in cash or securities of a value not less than one hundred dollars, with a recognizance to appear "as required by the order under which he is held."

The Council unanimously disapproves this bill.

The proposed amendment should not follow Section 57, which deals with the qualifications of *sureties*, but has to do with Section 79, relating to deposits in lien of surety by an arrested person himself.

H. 1883, line 7, "whose bail has been *fixed*." It is unfortunate that the same word should be used to connote both the original determination as to the amount required in a given case, and also the judgment or other fact which establishes the surety's liability, (1 Bouvier, Law Dict. Title "Fixing Bail") but probably the context would forestall any miscarriages.

"officer for the time being in charge of the place of custody." This would include every keeper of a town lockup, of a city prison or station house, every place used for the detention of bailable prisoners. And "officer for the time being" obviously enlarges the list of persons to whom is given the power to determine how much, if any, more than $100 would be adequate bail.

"U. S. Government Bonds," etc. Just why non-registered bonds

of the commonwealth, of a county, city or town, are omitted here, though included in Section 57, is not apparent.

"charged with an offence." This seems to contemplate police booking. But many an arrested person, booked, say, for mere drunkenness, finds when arraigned in court that other charges are to be made against him.

"not punishable by imprisonment for more than one year." But Chapters 265 to 274 inclusive of the General Laws contain many provisions for fine only, sometimes heavy, often trivial, and no account is taken of indeterminate sentences, releases on parole and matters which cannot be determined till after the court has functioned.

"as required by the order under which he is held." If this means a court order, that will come too late for the speedy release on bail which seems to be the chief purpose of H. 1883.

"not less than ($100) one hundred dollars." But bail commissioners now take cash bail of fifty dollars, even as low as twenty-five dollars where the offence is being present where gaming implements are found (usual penalty, $5.00).

"as soon as may be." There should be added, "and before the next sitting of the court of arraignment."

Section 2, line 9. It might remove some doubts if after the words "fifty-seven" there were inserted "or sixty-eight."

The sponsor of H. 1883 states that its chief purpose is to prevent the needless detention in local police stations and jails of many persons arrested for comparatively minor offences, where there is difficulty in securing the services of a bail commissioner and the court clerk will not leave his home at night to accept bail. (See Superior Court Rule 6.)

The list of actual beneficiaries of the proposed act are those for whom an imprisonment of not more than one year is possible. Those omitted are persons whose only penalty is a fine, those liable to arrest without a warrant under the many statutes permitting it where no imprisonment can be the outcome, those arrested on a court warrant after failure to answer a summons subject to the same qualification, and probably many others. At the same time it should be stated that of annually arrested persons (around 200,000 for the state) nearly half are arrested for mere drunkenness, very many of whom are released by probation officers after sobering up; and violation of motor vehicle laws and traffic rules account for about two thirds of the remainder. So that in mere numbers this act would give relief to a large group. Against this is the question whether it is wise to entrust a judicial function (see Rule 1 of Superior Court rules) to persons who might use it unwisely, and thereby increase bail defaults. The Council is of the opinion that it is unwise and that if there is really a shortage of bail commissioners in any given locality, the

obvious remedy is to increase their number. Their fees are limited by Chapter 262, Section 24, to two dollars in any misdemeanor case. Incidentally, H. 1883 does not make clear whether custodians would, or would not, be entitled to charge fees.

So far as concerns any increase in the number of bail commissioners, this would involve a study of the returns required to be made to the chief justice of the Superior Court under Chapter 276, Section 61, lines 20–27

The Crime of Breaking and Entering, House 438

By Resolves, Chapter 13 a report was requested on the subject matter of House 438.

The bill would repeal Sections 14, 15, 16, 16A, 17, 18 and 19 of Chapter 266 of the General Laws (Ter. Ed.), in short, all the laws relating to burglary and breaking and entering, and substitute for the seven sections repealed, five new sections numbered 14, 15, 16, 17 and 18. It should be noted incidentally that this method of enactment would leave a hiatus between the new Section 18 and the existing Section 20.

Section 14 now provides a penalty of from ten years to life for burglary (breaking and entering a dwelling house in the night time) with intent to commit a felony therein while armed, any person being in the house, or even though not armed, making an actual assault on any person in the house.

Section 15 now provides a maximum penalty of 20 years, and, if there has been a previous conviction under either Section 14 or Section 15, a minimum of five years, for burglary while unarmed and not making an assault on any person in the house.

Section 16 now provides a maximum penalty of 20 years in State prison or a maximum of 2½ years in the House of Correction for breaking and entering a building, ship or vessel in the night time with intent to commit a felony. The alternative sentence to a House of Correction was provided for by St. 1943, c. 343.

The present Section 16A (inserted by c. 229 of the Acts of 1945) provides that whoever in the nighttime or daytime breaks and enters a building, ship or vessel with intent to commit a misdemeanor shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months, or both.

Section 17 now provides a maximum sentence of 10 years for entering in the nighttime or breaking and entering in the daytime a building, ship or vessel with intent to commit a felony, the owner or any other person lawfully therein being put in fear.

Section 18 now provides a penalty of not more than 10 years in the State prison or a fine of not more than $500 and imprisonment for not more than two years in jail for entering without breaking a

dwelling house in the night time with intent to commit a felony or breaking and entering in the daytime a building, ship or vessel with intent to commit a felony, no person in the dwelling house, building, ship or vessel being put in fear.

Section 19 now provides a penalty of not more than 10 years in State prison or a fine of not more than $500 and imprisonment in the House of Correction for not more than two years for breaking and entering or entering without breaking, in the nighttime, a railroad car with intent to commit a felony.

Section 14 of the petitioner's bill (House 438), as we understand it, has the effect of amending the existing Section 14, relating to burglary either while armed or making an assault on a person in the dwelling house, so to bring specifically within the section, buildings, ships, railroad cars, apartments, hotel rooms, lodging houses, boarding houses and offices, and making the minimum penalty 2½ years in the House of Correction instead of the present minimum of 10 years in State prison, leaving the maximum penalty as it now is, life imprisonment, and having the penalty apply whether the breaking and entering is in the nighttime or daytime.

Section 15 of the petitioner's bill relates to breaking and entering in the nighttime, or entering without breaking the places mentioned in Section 15 of his bill "*with intent to commit any felony except larceny*," providing for a maximum punishment of 20 years in State prison and, if there has been a previous conviction under Section 14 or Section 15, a minimum of five years.

Section 16 of the petitioner's bill provides a maximum punishment of 10 years in State prison or a fine of $500 and a maximum of 2½ years in the House of Correction for the offence described in Section 15 when committed in the daytime.

Section 17 of the petitioner's bill provides: Whoever breaks and enters, or enters without breaking, in the daytime or nighttime, a building, ship, vessel, railroad car, dwelling house, apartment, room in an inn, lodging house, boarding house or office (the same places named in his previous sections) and commits larceny therein and steals therein property of a value exceeding $100 shall be punished by imprisonment in the State prison for a term not exceeding 5 years or imprisonment in a jail or house of correction for a term not exceeding 2½ years or by a fine not exceeding $500 or both. (We assume that the intended alternative to the State prison penalty is a fine of not more than $500 or not more than 2½ years in the House of Correction, or both such fine and imprisonment in the House of Correction). 2. If the value of the property does not exceed $100 he shall be punished by imprisonment in a jail or house of correction for a term not exceeding 2½ years or by a fine of not more than $100 or both.

Section 18 of the petitioner's bill provides that "Whoever breaks and enters or enters without breaking in the daytime or nighttime a building, ship, vessel, railroad car, dwelling house, apartment, room in an inn, lodging house, boarding house or office, *with any intent other than mentioned in preceding sections*, shall be punished by imprisonment in a jail or house of correction for a term not exceeding two years or by a fine not exceeding $500 or both."

Common law burglary is an offense against the security of the habitation and while in statutory burglary (offenses against buildings other than dwelling houses, railroad cars, vessels, etc.) the idea of offense against habitation is not so prominent, still burglary, common law or statutory, is not to be confused with larceny and it seems to us that is just what the petitioner is doing when he would make the penalty depend upon the amount stolen as he does in Section 17 of his bill.

Certainly the alarm of an awakened sleeper who found a burglar in his room would not be any less because he later discovered that the burglar took only his wife's $50 watch and overlooked $100 in bills. The gist of the offense always has been the burglary, that is to say, the breaking and entering with felonious intent. If that existed, it mattered not how much was stolen nor did it matter if the burglar was caught or frightened away before he had time to steal anything.

As we read the bill it nowhere provides a penalty for breaking and entering with intent to commit larceny, except where the burglar is armed or makes an assault upon someone in the place burglarized. Such a case is provided for in Section 14 of his bill as it is in Section 14 of the present law. The petitioner's Sections 15 and 16 deal with breaking and entering with intent to commit any felony except larceny. Section 17 deals with the commission of the crime of larceny after a breaking and entering and makes no reference to the intent. Section 18 provides for breaking and entering "with any intent other than mentioned in preceding sections." Certainly a reading of this section and the preceding sections does not make it clear that it is intended to embrace within this section the crime of breaking and entering with intent to commit larceny. If that is the intention the penalty provided is utterly inadequate.

One seeking a change in the law has the burden of showing the necessity for the change. Nobody has shown us such necessity. The petitioner is not the author of the proposed legislation. This certainly is no time for lessening any of the security at present afforded by law to either our persons or our property. Our present laws relating to burglary and breaking and entering work well in practice. While it is unnecessary to allege a stealing in an indictment for breaking and entering it is done in some of our counties and it is the prac-

tice, where the offense is of a minor character, to accept a plea of guilty to so much of the indictment as charges the larceny. In other counties it is customary to charge the breaking and entering in one count and the larceny in a second count and the case is disposed of, where the situation warrants it, by accepting a plea of guilty to the larceny charged in the second count. The power of the district attorney to enter a nolle prosequi to part of the indictment is availed of regularly.

The existing law, administered by men of good sense, permits humane treatment of the offender. But, after all, it is the law-abiding citizen who deserves the first consideration at the hands of those who make the laws and those who administer them. This is forgotten in proposed legislation, as it seems to us, and we do not recommend its passage.

Joinder of Parties House 935

By Resolves Chapter 33 a report was requested on this bill which is printed in a footnote.*

The bill would allow a defendant to add as party defendant anyone who conceivably might be liable to the original defendant or the plaintiff on account of matters alleged in the original action. The provisions of the bill might tend to reduce the amount of litigation as to a particular matter but the possibility of confusion, delay, and abuse seem to outweigh the meritorious features of the bill. If a third party is liable to the *defendant* for all or part of the plaintiff's claim against the defendant, the law, as it now exists, provides a remedy for the defendant. If the defendant claims that a third party is liable to the *plaintiff* for all or part of the plaintiff's claim against the defendant, the law now provides for the addition of additional parties defendant. In practice the plaintiff is usually willing to include as party defendant anyone who might be liable to him on account of his original claim whether he knows of the third party or is informed of the liability by the original defendant. The confusion already existing in the offices of the clerks of courts and in the trial of cases on account of the recent statute (Chapter 350 of 1943) permitting joinder of actions would be substantially increased. The present state of the law is adequate to take care of the situations which the proposed law is designed to affect. Accordingly, we do *not* recommend passage of House No. 935.

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*HOUSE 935

Relative to Joinder of Parties

Chapter two hundred and thirty-one of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by inserting after section fifty-four the following new section:—

Section 54A. Before the filing of his answer the defendant may move ex parte or, after

the filing of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to make service of process upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and due service of process is made, the person so served hereinafter called the third-party defendant, shall within such time as may be allowed by statute or by rule of court enter his appearance and also within the same time or within such other time as may be prescribed by statute or by rule of court file a motion to dismiss, answer in abatement, demurrer, plea or answer.

The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff.

The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as defendant.

A third-party defendant may proceed under this section against any person not a party to the action who is, or may be, liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

Entry Fees for Plaintiffs not Claiming Jointly who Have Joined in One Action Under Chapter 350 of the Acts of 1943

In view of the expense to the public of maintaining the courts, discussed in the report of the joint committee on ways and means in 1943 and referred to on pages 61–62 of our 20th Report, we see no reason why each separate plaintiff thus allowed to join with others in an action arising out of the same facts should not be expected to pay the same entry fee that he would pay if he brought a separate action. We therefore recommend the following

DRAFT ACT

Section 4A of chapter 231 of the General Laws inserted by chapter 350 of the acts of 1943 is hereby amended by adding at the end thereof the following sentence: Persons not claiming jointly who join in one action as plaintiffs under this section shall pay the same entry fee as would be required in separate actions.

House 1121

Waiver by the Commonwealth of Immunity from Liability, in Tort, Within the Admiralty Jurisdiction for Damage to Vessels or Injuries on Vessels Due to Negligence of Draw-Bridge Tenders or Other Employees

By Resolves Chapter 38 a report was requested on the subject matter of House 1121 as outlined above. The bill is carefully drawn by the petitioners who are admiralty lawyers of experience and, if any legislation waiving immunity by the Commonwealth in this limited class of cases is to be considered, the bill, if the retroactive feature is stricken out, appears to be in proper workable form for that purpose.

The Council had a conference with the petitioners at which they explained their reasons and submitted copies of the memoranda of March 5th and March 12th, 1946, which they had submitted to the Joint Judiciary Committee prior to the reference of the matter to the

Council. Aside from the form of the proposed bill, certain broad questions of policy as to matters of substantive law are involved — first, whether there should be a general waiver by the Commonwealth of immunity from liability in tort, and second, if not a general waiver, whether an exception should be made by a waiver in the limited class of cases of damages to or on vessels involving about thirty bridges which were within the admiralty jurisdiction of the Federal Courts when cities and counties were responsible for the operation of bridges prior to the passage of St. 1945, chapter 690. By that act the operation of the bridges was taken over by the Commonwealth. These are such broad questions of public policy on a matter of substantive law for the consideration of the legislature that the Council makes no recommendation as they appear to be outside the field of the Judicial Council and involve more extended study than is feasible in view of the other matters before it.

For the assistance of the legislature in considering those questions, however, a majority of the Council submit the information and a summary of the arguments which have been called to our attention.

Prior to the act of 1945 referred to, a city or county within the commonwealth was liable to suit in the federal courts for torts of its bridge tenders (see *O'Keefe* v. *Staples Coal Company*, 201 Fed. 131 (Dec. Mass. 1910; *Workman* v. *New York City*, etc. 179 U. S. 552). Since the act of 1945 the only remedy is against the bridge-tender personally in admiralty as he is responsible for his negligence. It is not uncommon in such cases, if a judgment is recovered against the employee, for his public employer to reimburse him. The petitioners contend, in regard to the "subject matter," that a general waiver of immunity in tort would be desirable and they refer to the fact that four states have adopted such legislation — New York (Laws of 1929, chapter 467 §1); Michigan (Public Acts of 1943 — No. 238 (27, 3548 [24] approved April 21, 1943); California (Deering's California Code, Political-Government, ch. 3 § 16041 and 16021); Washington (Remington's Revised Statutes, Ch. 3 §886); and the United States by the Federal Tort Claim Act Approved August 2, 1946 (Title IV of Legislative Reorganization Act — Public Law 601 §410).

The petitioners also called attention to articles by Professor Borchard on the subject in 36 Yale Law Journal, 17, 757, 1039; 28 Columbia Law Review 577, 735; and 20 American Bar Association Journal 747. *Evans* v. *Berry*, 262 N. Y. 61; 3 Maitland, "Collected Papers," 263, and an opinion by Justice Frankfurter, Stone C. J. and Roberts J. concurring, in *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47, 59 were also cited.

The 11th amendment to the Constitution of the United States (which prevents suits against a state by citizens of *another* state) does not apply to suits against a state by citizens of that state, and as to

suits by residents of another state the protection of the 11th amendment may be waived. See *Kennecott Copper Corp.* v. *State Tax Com.* 66 U. S. Sup. Ct. 744 (March 25, 1946) and cases cited in 59 Harv. Law Rev. (May 1946) pp. 802, 803.

In answer to all that may be said in favor of a general waiver of government immunity in tort it is said that, as a practical matter, in these days of claim-mindedness and demands on the public treasury in every direction, the Commonwealth needs the protection of of immunity in tort. The old "snow and ice" cases against cities (when they were liable) and the multiplication of claims under the compulsory motor vehicle insurance act indicate what is likely to happen if the Commonwealth opens up its treasury to actions of tort of all kinds.

Whether it is logical or not, the present not uncommon practice of protecting a public employee who is sued, from loss in deserving cases, provides the Commonwealth with some protection against large numbers of claims of every variety.

It is for the legislature to consider these questions. We simply call attention to their different aspects without recommendation one way or the other.

If the legislature should waive immunity only in the admiralty cases of collisions with bridges or publicly owned vessels, then *only* would the question of procedure arise, and the reasons for submitting such cases to the federal courts would seem convincing because:

(1) The admiralty court already has jurisdiction over maritime torts where the right to sue is given. By reason of the familiarity of the federal judges with cases arising out of marine collisions, they are, we submit, best qualified to deal with such cases.

(2) The doctrine of contributory negligence does not apply in admiralty, but simply goes to mitigate the damages.

(3) The Commonwealth, by having suits (provided for in the bill) tried in the admiralty court, would have the right to implead third parties which could not be done in any state court action. Under Admiralty Rule 56 of the United States Supreme Court, anyone sued in the admiralty court may bring in a third party who may be either wholly or partly at fault for the collision and the case will then proceed as though the third party had been an original respondent in the suit. This would seem to be a clear advantage to the Commonwealth.

TRIALS BEFORE THREE JUSTICES—SENATE 234

By Resolves Chapter 11 a report was requested on this bill which provides:

SECTION 1. Chapter two hundred and twelve of the General Laws, as appear-

ing in the Tercentenary Edition, is hereby amended by adding after section two thereof the following new section: —

Section 2A. (*a*) In any action at law where a trial by jury has been waived or the parties agree that the cause may be tried under this section, and in any suit in equity any party may file a claim of trial by three justices of the superior court and thereupon the cause shall be heard and determined by three justices of the superior court. Said justices shall be assigned by the chief justice of said court. A decision of a majority shall be the decision of the court. The practice and procedure before said three justices shall be the same as heretofore in actions at law and suits in equity respectively.

(*b*) If the parties so agree the decision of the said three justices, or a majority of them, shall be final and conclusive upon all matters in controversy whether in matters of fact or law. But the said three justices, or a majority of them, may after a finding of facts, either of their own motion or at the request of any party, report the case to the supreme judicial court for determination by the full court, and thereupon like proceedings shall be had as in reports in actions at law and suits in equity respectively.

SECTION 2. Chapter two hundred and fourteen of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding at the end of section sixteen thereof the following words: — except as provided in section two A of chapter two hundred and twelve.

With the exception of election cases the development of the judicial system thus far has been in the direction of trials in the first instance before a single judge with or without a jury subject to appellate proceedings. The plan proposed of taking three judges of the Superior Court from other work in any case in which a jury is waived would, in our opinion, disrupt the work of the Superior Court throughout the Commonwealth and cause delays and difficulties not in the public interest. We do *not* recommend Senate 234.

SENTENCING (*Resolves Chapter 16*)

As stated in our 21st Report, (p. 36), the commissioner of corrections in paragraph 10 of his report (printed as H. 58 of 1945) recommended the appointment of a special commission for the following purpose:

"In order to determine whether or not the courts should have the assistance of a 'treatment Tribunal' or a 'Sentencing Board' to assist them in the sentencing of those convicted of crime, and for a study of the sentencing and commitment laws to the penal institutions and the Massachusetts Training Schools and to provide for the proper places for the education and reformation of those so sentenced or committed."

The commissioner then introduced a resolve (House 68 of 1945) for that purpose. Thereafter the Committee on Judiciary reported a resolve (Senate 478 of 1945) for a special commission:

"for the purpose of making an investigation and study of the laws of the commonwealth relating to the sentencing and committing to the various penal institutions

in the commonwealth and the Massachusetts training schools of persons convicted of criminal offences. The commission shall particularly consider the advisability of establishing and maintaining a treatment tribunal or sentencing board to assist the criminal courts in a program of reformation and education and in the sentencing and committing of convicted persons to imprisonment or to the Massachusetts training schools, and shall ascertain whether the facilities provided by the counties and the commonwealth for the incarceration, reformation and education of persons convicted of crime are being fully utilized, and if not, in what way the same may be conveniently and advantageously used."

This proposed resolve (Senate 478) together with House 68, was then referred to the Judicial Council with several other bills, by resolves Chapter 32 of 1945, providing in part as follows:

"Resolved that the Judicial Council is hereby requested to consider the subject matter" of Senate 478 and House 68 "relative to the sentencing of persons convicted of crime."

We called attention to the fact that no specific bill was submitted or referred to the Council, but the Council was requested to consider the general "subject matter" relative to the sentencing of persons convicted of crime described in House 68 and Senate 478 (which were based on paragraph 10 above quoted of House 58). The reference and request, therefore, were for a general inquiry as to specifications in the resolves thus referred.

As this is a large subject which has been under discussion to an increasing extent throughout the country for some years, the Council suggested that the matter go over to this year. Thereupon, by resolves chapter 16 of 1946 the Council was "requested to consider further the subject matter" of S. 478 and H. 68 "relative to the sentencing of persons convicted of crime."

A consideration of "the sentencing of persons convicted of crimes" cannot stop at the imposition of sentence any more than it can begin at the moment when the imposition of sentence becomes the duty of the judge. When, therefore, there are proposals looking either to the limiting of the power of the judge or to assisting him in his duty, it is well to consider (1) what means of knowledge he has before sentence is imposed; (2) what aids are already at his command or imposed upon him by law; and (3) what may become of the prisoner after sentence.

For the most part, our statutes fix the penalties for crimes together with a provision that if no punishment is provided by statute the court shall impose such sentence, "according to the nature of the crime, as conforms to the common usage and practice in the Commonwealth." *Manslaughter, for example, is punishable by imprisonment in the state prison for "not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years."

* G. L. c. 279 §5.

Great latitude as to the period of confinement and the amount of the fine is afforded the court in the matter of sentence, the idea evidently being that the same crime, as far as name is concerned, may vary greatly in the circumstances surrounding its commission, as well as in the age of the person committing it and his previous history.

In the case of all sentences to the state prison, except for life or as an habitual criminal, the court cannot fix the term of imprisonment, but must fix a maximum and minimum term for which the convict may be imprisoned and the maximum term cannot be longer than the longest term fixed by law for the punishment of the crime of which he has been convicted and the minimum term cannot be less than two and one half years.* The Superior court alone can impose sentences to the state prison. From this it will be seen that a judge of that court could, in a case of manslaughter, impose a sentence to be executed in the state prison, fixing the minimum and maximum terms anywhere from two and one half years to twenty years. But he would not be required to impose a state prison sentence and could send the convict to jail instead. If a district court took jurisdiction of this crime it could only impose a jail sentence, limited to two and one half years, and a fine. This illustration as to the situation in the case of manslaughter is fairly typical although it should be remembered that a great many crimes carry no state prison sentence and that their punishment is limited to the imposition of a fine of "not more than" a certain sum or to the imposition of a sentence to jail of "not more than two and one half years" or less, or to both fine and imprisonment.

Provisions for sentences of this character have long been a part of our statute law and it would seem that it was thought when they were first devised that, given a wise and considerate judge, the punishment could surely be made to fit the particular crime. As time went on, however, it evidently was thought that perhaps this beneficient plan as to sentences might not work out too well in all cases. State prison and jails might not be the places in which there would be much hope for the reformation of the reformable or the salvaging of the young who had committed crimes, and so we came to have our reformatories for men and women,our training schools for boys and girls and our state farm, not forgetting our county training schools.

With the advent of these institutions, one by one, limitations were placed by statute upon the courts on what could be done with and for those who were eligible for commitment to them. For example, the reformatory at Concord was open only to males under thirty years of age, not previously sentenced for felony more than three times, convicted of crime punishable in the state prison or jail or house of correction. The reformatory for women was made the

* G. L. c. 279 §24.

place of confinement for women convicted of a felony where they went for an indeterminate term unless sentenced for more than five years. Women could and can be sent to jail or the house of correction if the sentence in case of a male prisoner does not exceed two and one half years. Age limits were placed for boys who might be sent to the training schools and careful provisions were made as to their trial and commitment.*

All these measures were undoubtedly taken with the hope, if not the expectation, that somewhere along the line men, women and children could be returned to society as worth while individuals. The judge was an all important factor in all this inasmuch as it was his decision, limited carefully it is true, which sent the offender to that place of confinement which appeared to him to be the best, in all the circumstances.

In this connection and as something that is at times lost sight of, it should be kept in mind that sentence is almost always imposed by the judge who has presided at the trial of the accused or who has heard him plead guilty. All the proceedings take place in the presence of the judge and the accused and as a rule the former has full opportunity to and does observe the latter closely. Any judge, sensible of the possibility that he may be called upon to deprive one of his liberty for a time can hardly be thought to be oblivious to this tremendous responsibility or to fail to avail himself of all possible sources of information which will help him in making his decision. It may seem, at times, that there are some who are convinced that this matter of sentencing by a judge is a routine matter in which little, if any, careful thought is given by the judge to the two all important questions, namely; what is best for society and, with that in mind, what is best for the offender. Without doubt a judge of a district court is not required to spend much time and thought over what to do with one who is before him on the sixty-fifth charge of drunkenness but it requires but a very few visits to most of our courts, in order to see at first hand the time and care that is taken by the judge in disposing of the cases before him.

Beginning about 1880, however, (following judicial experiments with probation under volunteer supervision beginning about 1841) it was thought that the foregoing sources of information were not enough and probation officers were provided for by statute, appointed by the courts, and began to serve as helpers and advisors to the judges. Their duties are now defined by statute (G. L. C. 276, S. 85). Among other things, they are required, as the court may direct, to "inquire into the nature of every criminal case brought before the court . . . and inform the court, as far as possible, whether the defendant has previously been convicted of crime and in the case

* G. L. c. 279 §§23, 31, 33, 16; c. 119 §58A; c. 120 §11.

of a criminal prosecution before said court charging a person with an offence punishable by imprisonment for more than one year the probation officer shall in any event present to the court such information as the board of probation has in its possession relative to prior criminal prosecutions, if any, of such person and to the disposition of such prosecution, and all other available information relative thereto, before such person is admitted to bail in court and also before disposition of the case against him by sentence, or placing on file or probation. . . . He may recommend to the justice of his own court that any person convicted be placed on probation. He shall perform such other duties as the court requires."

The superior court may place upon probation under any of the probation officers any person before it charged with crime for such time and upon such conditions as it seems proper, and any court may do the same except that in the district court no person convicted of a felony in that court shall be placed on probation by said court if it shall appear that he has previously been convicted of a felony.*

The duties of probation officers, many of which have not been mentioned here, are onerous to say the least, depending largely upon whether there are enough of them and it has been said that there are not enough. This is a matter upon which we do not feel that we can express any opinion. It is undoubtedly true that probation officers vary as to their efficiency. It has been called to our attention that some of them do not avail themselves of the aid which they might get from the board of probation. On the whole, however, we are of opinion that, as a whole, they constitute a body of conscientious men and women, many of whom have devoted the greater part of their lives to the faithful performance of their duties, not only as aids to the courts but also in their endeavors to rehabilitate the probationers entrusted to their care. The only other observation we wish to make in this connection, based upon reports as to the results in probation cases, is that the courts as a whole might consider whether it is advisable from the standpoint of the public or the convict to place the latter on probation, as has been done in some instances, time and again.

This is as good a place as any to speak of our juvenile courts. Forty years ago the definite movement began to separate to a marked degree offenders not over seventeen years from older ones, at least in the method of dealing with them in court and thereafter. There is little occasion to dwell upon the system.† It is familiar to all who have the interests of our youth at heart. The juvenile court of Boston has long been a great example of what effective administration can accomplish. The subject of juvenile delinquency has been one of

* G. L. c. 276 §87; G. L. 279 §§1, 1A.

† G. L. c 119 §§55, 58A, 65, 67, 83.

great concern and a commission was appointed this year to consider it and report.

What may be done with a person who commits a crime depends upon the mental capacity of the person who commits it. Speaking broadly, he must have had sufficient mental capacity to appreciate the difference between the right and wrong of the matter and in this connection our statutes lay down certain definite requirements and otherwise make provision for certain sources of information for the courts with the end in view that mental responsibility may be determined.

In order to determine the mental condition of any person coming before any court of the commonwealth, the presiding judge may, in his discretion, request the department of mental health to assign a member of the medical staff of a state hospital to make such examination as he may deem necessary.* If any person under complaint or indictment for any crime is, at the time appointed for trial or sentence, or at any time prior thereto, found by the court to be insane or in such mental condition that his commitment to an institution for the insane is necessary for his proper care and observation pending the determination of his insanity, the court may commit him to a state hospital or to the Bridgewater state hospital under such limitations, subject to certain limitations, as it may order. Moreover, whenever a person is indicted for a capital offence, or whenever a person, who is known to have been indicted for any other offence more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of court, as the case may be, or the trial justice, shall notify the department which shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. Probation officers who have in their possession or whenever the inquiry which they are required to make discloses facts which if known to the clerk would require this notice, the probation officers must forthwith communicate the same to the clerk who must thereupon give such notice. The department must file a report of its investigation with the clerk which is available to the court, the probation officer thereof, the district attorney and to the attorney for the accused.

It is important to have in mind that whoever is convicted of a crime before a district court or trial justice may appeal to the superior court, and that at the time of conviction shall be notified of his right to take such appeal. Moreover, no order shall be made for the commitment of a person to a jail or house of correction upon a sentence of more than six months imposed by a district court, until at least one

* G. L. c. 123 §99, 100, 101A.

day after imposition of such sentence, and that before such order is made, he shall be notified of his right to appeal to the superior court, and he may exercise such right, as provided by law, until such order is made. This right of appeal applies to children ordered committed to the Lyman School, the industrial schools for boys and for girls. Moreover, if a child found guilty by a court or trial justice is not considered a fit subject for the Lyman school or the industrial schools for boys and girls, he shall be sentenced or bound over to appear before the superior court according to the usual course of criminal proceedings.

The foregoing is something of an overall picture of the legal environment surrounding a judge whenever there is a possibility that he may be called upon to dispose of a convict. We have not mentioned other sources of information available to him such as police officers, welfare agencies, public and private, and friends and relatives of the convict. Nor have we stressed the fact that in many of our judicial districts the local judge in time comes to know a great many of the offenders who come before him, their background, their propensities and the more than likely result, based upon experience, of whatever disposition of the case is made.

Let us assume that a judge has invoked all available aids in helping him determine a proper sentence, including the place of confinement. It then may be of interest to learn what may happen to the convict and here again we must turn to the statutory provisions in this regard.

Except in any case in which a different sentence could not have been imposed, an appellate division of the superior court may review and revise, up or down, any sentence to the state prison and also sentences to the reformatory for women of over five years, imposed by final judgment. (St. 1943 c. 558; St. 1945 cc. 255, 437.)

The commissioner of correction may remove a prisoner* to the state prison colony from the state prison; to the reformatory at Concord from the state prison; to the state prison or to any jail or house of correction from the reformatory; to the reformatory, a sentenced male prisoner, from the state farm; to any house of correction in the county where convicted from the state farm; to the reformatory, any male prisoner, from jail or house of correction, if at the time of removal the prisoner could lawfully be sentenced to the reformatory; from one jail to another in the same or another county; from jail to house of correction; from one house of correction to another in the same or another county; from a house of correction to a jail; from jail or house of correction to the state farm; from the reformatory at Concord, the state farm, the jails and houses of correction to the state prison colony; to the state prison any person convicted upon an

* G. L. c. 125 §41B; c. 127 §§97–118.

indictment for a felony and sentenced to the reformatory; from the reformatory at Sherborn to the state farm or to a jail or house of correction, from the state farm or a jail or house of correction, any female to Sherborn; any person committed to a department for defective delinquents or for drug addicts from one institution for such prisoners to another; with the consent of the Governor and Council, from the state prison to the state farm, any prisoner who is infirm in body or mind; at the request of the Governor and Council, from jail or house of correction to the state farm for treatment of disease. In case of removal the sentence is not changed.

Sheriffs, except in Suffolk county may move prisoners around within the confines of their own counties and county commissioners have certain powers to release prisoners. (G. L. c. 127 §§115, 140 et. seq.)

Sentences imposed by the court are subject to the statutes relating to parole which provide for the release of prisoners by the board of parole after portions of the sentences have been served if the prisoners, by their conduct, have demonstrated that they are so entitled.* Finally there is the power of pardon vested in the Governor, subject to the advice and consent of the Council.

Perhaps it should have stated earlier that if a prisoner appears to be insane after commitment or in need of observation for the purpose of determining his insanity, statutes somewhat similar to those relating to this matter which have already been referred to may be invoked for similar purposes. (G. L. c. 123 §§102–105.)

It may seem to some that these various provisions for the revision of sentences, the transfer, release and pardoning of prisoners after sentence would have a tendency to make the courts less thoughtful in the matter of imposing sentences; but if that thought exists, we do not share it. On the contrary, we are of opinion that, by and large, the judges of our courts are deeply conscious of their obligations in this respect and that while they may realize that their work may be undone almost overnight, nevertheless, as a rule, they bow to the judgment of those who may accomplish this, assuming that those officials are equally mindful of their obligations.

It would be strange indeed if with so many judges of our several courts, who have the duty of passing sentence on their fellow men, there was not some criticism of their judgment, too frequently by those whose knowledge of what was before the judge is not gained by personal observation. Rarely has there ever been any criticism of their motives. They are answerable only to their oaths of office. They are not required to court favor with the electorate. All this, however, does not serve as an answer to the question whether they

* G. L. c. 124 §7; c. 127 §§128 et seq.

could do better work in the matter of sentencing if they had at hand more aid, assistance and advice.

It is true that in some jurisdictions, notably in New York, New Jersey and California and in the Federal courts steps are or have been taken to set up some sort of an advisory or control board which, after sentence will determine the particular institution in which sentence will be executed, or advise the judge, before sentence, as to what it thinks should be done with the convict. Any of these plans must, of necessity, depend to a great extent upon the background of law in these jurisdictions as to proceedings before and after sentence. We are reliably informed that the Governor of one state where one of these methods is in operation, has recently stated that it might be well to go slowly in the matter.

We are not sufficiently cognizant of the background of the law in these jurisdictions to determine whether any of these plans fills a void which does not appear to exist in this Commonwealth.

From a survey of our entire system, we are not persuaded that it would be improved by the adoption of any of the plans which have come to our attention or that sentences imposed under any of them would be any more unassailable than they are today.

What has been said tells chiefly what magistrates *can* do with offenders, and what can be later done by those in charge of persons deprived of liberty. What magistrates actually *do* is shown in graphs on page 63 compiled from available reports of the Commissioner of Correction. They illustrate a rather wide use of alternative dispositions. They also show what a relatively small proportion of alleged offenders actually experience loss of liberty. Of course a great many offences admit only of a fine, the chief classes being in the motor vehicle group and so-called "prudential regulations." But, of those actually imprisoned, roughly two out of three are recidivists — quite a commentary on the efficacy of our present penal and reformative measures. Or it may only mean that a certain segment of society hopelessly irreclaimable.

By way of contrast to the number of court sentences shown on the graph compiled from the report of the commissioner of corrections for 1942 (the latest printed report) we find the following figures of removals and transfers by the commissioner of corrections in 1942 after the courts had imposed the sentences:

TABLE OF REMOVALS AND TRANSFERS, 1942

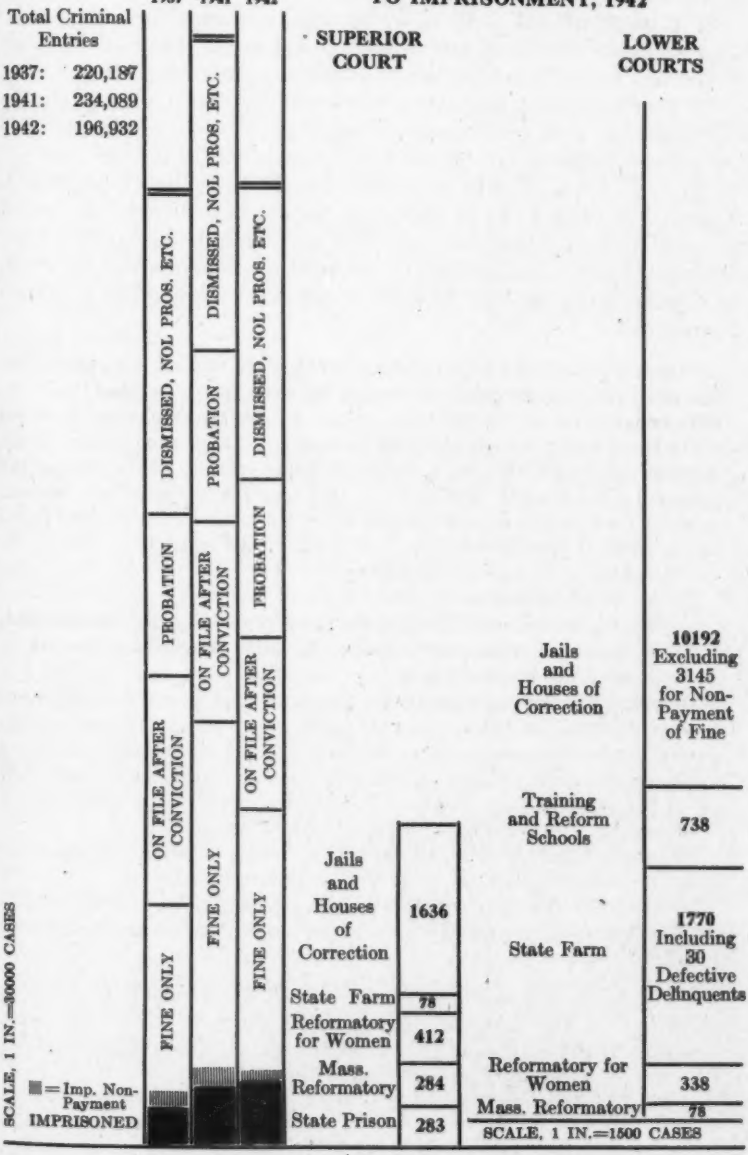
Removals by Commissioner of Correction:	
From State Prison	338
From State Prison Colony	131
From Massachusetts Reformatory	127
From Reformatory for Women	1
From Jails and Houses of Correction	148
From State Farm	583
To State Prison	55
To State Prison Colony*	949
To Massachusetts Reformatory	134
To Jails and Houses of Correction	209
Removals by order of Trustees of Massachusetts Training Schools:	
From Industrial School for Boys	9
From Industrial School for Girls	7
From Lyman School for Boys	9

* Courts cannot sentence direct to State Prison Colony.

Speaking generally, we are not yet persuaded that the time has come for any further curbs on judicial determination of criminal sentences. Of course, any such judicial action is bound to be the product of the individual judge's experience and environment. The desideratum of like action in like cases is not attainable under our segregated court system, which poses the question whether the better method of approach is not by breaking down the fences of isolation. The Administrative Committee of District Courts is a potent factor for uniformity in that area, as is any agency which promotes association, the parent of uniformity.

The ultimate justification and purpose of a system of criminal penalties is protection of the law abiding part of society. Individual reclamation is secondary, though the scale division on the graphs may well raise a doubt whether it has not usurped primary place. The acid test of any proposal for a change is — Is there any group more competent than the judiciary to keep that primary purpose constantly in mind, less amenable to improper influence, less apt to forget its obligations, and its oath of office? Such proposals are not wanting. They run the gamut from mere opportunity for advice to complete removal of the sentencing function, leaving to the courts only determination of guilt. The proposal to furnish more advisory service, at the option of the judge, justifies the prediction that those who need it most will use it least. Those who really want outside advice will not lack ways to get it. The requirement of knowledge about the offender is pretty well met by the duty of the probation officer to produce the record, and his right to make recommendations as to disposition. Of the proposal to make all sentences "to the department of correction" a leap in the dark, we thoroughly disapprove, as an invitation to political manipulation and special privilege. There is still truth in the adage "stick to the devil you know" and courts sentence in daylight.

COURT SENTENCES TO IMPRISONMENT, 1942



Release of Drunks

The special commission appointed in 1943 to investigate drunkenness in its report (H. 2000 of 1945) explained how the law permitting "release," without arraignment, of drunks, who had been arrested not more than four times within a year, worked in practice. They gave a striking illustration of one who had been released thirty-five times and they recommended that the law be changed to provide for release without arraignment only once within a year (see pp. 24–27). In spite of this the legislature of 1946, by Chapter 274, amended the law so as to make the release mandatory (instead of permissive) four times in a year. The operation of this law has been described by the administrative committee of the district courts in its circular letter of July 20, 1946 (reprinted in appendix A, p. 86) as follows:

> "The amendment to Chapter 272, section 45 of the General Laws affected by this act is simple in language. It changes the word "may" to "shall." The results, however, are very troublesome. We are advised that the procedure in one of the larger courts brought about the amendment. It is a good example of the result of one court's following a distinctive course contrary to the practice and judgment of other courts. The bill was . . . not caught by the Board of Probation; no one of the Committee knew anything about it until notice was received that it was in effect. Generally speaking, it does away with practices in some of the courts which may be described as follows:
>
> (1) No release for Sunday drunks.
> (2) Settling domestic troubles with the aid of penalties in drunkenness cases.
> (3) Holding men who, while recovered from the intoxication, are not fit physically to be turned loose.
>
> "It will require discontinuance of the practice of a complaint for drunkenness to accompany one for driving under the influence if the defendant has not been arrested for drunkenness four times within a year. It will require that when a wife complains of her husband's habits of intoxication and desires he be brought before the court, the only complaint which will hold will be for disturbing the peace and that, only if the facts will support such a complaint.
>
> "When a complaint is made and warrant for arrest is asked, before such can be issued, it will require that the record of the defendant be obtained.
>
> "It is our understanding if an arrested man refuses to accept release or sign a statement, he will have to be arraigned and stand trial. It became effective June 8th."

We recommend the repeal of the recent act referred to and the restoration of the judicial discretion in place of the new indiscriminate statutory disposal, by wholesale, of such cases without regard to the facts, and submit the following:

DRAFT ACT

Chapter 274 of the Acts of 1946 is hereby repealed.

RECOMMENDATION FOR REPEAL OF 2-YEAR PROHIBITION OF REMARRIAGE AFTER ABSOLUTE DECREE OF DIVORCE

Secton 24 of chapter 208 of the General Laws provides that

> "After a decree of divorce has become absolute, either party may marry again as if the other were dead, *except that the party from whom the divorce was granted shall not marry within two years after the decree has become absolute.*

The tragic consequences of this 2-year prohibition, as pointed out in our 21st Report (pp 18–19), were illustrated by the case of *Wright* v. *Wright*, 264 Mass. 453 in which the wife, unconscious of any legal obstacle, was married to the divorced man in another state where the marriage was valid, but found herself unmarried in Massachusetts and any children of the marriage illegitimate in Massachusetts. We recommend the repeal of the 2-year prohibition on the ground it is "not a healthy condition of the law which invites such consequences."

Since that Report the case of *Wright* v. *Wright* has been overruled by the Supreme Judicial Court in case one of the parties to the remarriage was unconscious of any legal disability, in the case of *Vital* v. *Vital* (Mass. 1946 Advance Sheets 217, 319 Mass. 185).

While this later decision improves the situation slightly, it leaves the validity of the marriage and the legitimacy of innocent children in the air on the uncertain question of the state of mind of one of the parties at the time of the marriage, and as has been recently stated, if this question of state of mind never comes before a court except on a petition for separate support, or something of that kind, it may never be determined at all before it is too late and the legitimacy of the children and any property rights which may be involved are left uncertain. It has been called to our attention that there are many more of such cases than is generally realized of those who do not understand the law, who have not had it explained to them clearly and who, as is natural for persons who are not lawyers, do not understand why or how an absolute divorce can be only half absolute. We have been informed that this happens frequently in the case of veterans.

The present law does not stop remarriages and it does not seem that questions of marriage and legitimacy of children should be left by law in any such uncertain condition with all its possibilities of tragedy in uncertain relationships, confusion of property rights, etc. Like the late experiment with prohibition, a law which does not work, not only fails of its purpose, but produces unintended and harmful results — in this case especially to children — and it does not work because it exceeds what Dean Pound has described as "the limits of effective legal action."

We recommend the repeal of the prohibitory clause and submit the following:

DRAFT ACT

Section 24 of chapter 208 of the General Laws (as appearing in the Tercentenary Edition) is hereby amended by striking out the words:

"Except that the party from whom the divorce was granted shall not remarry within two years after the decree has become absolute."

A Plan to Save Counties Some Money — House 365 of 1945, to Reduce Recording of Repetitions in Mortgages at Public Expense

With the present movement in real estate there is more conveyancing and consequently more documents full of words to be recorded and permanently stored in accessible places than at any time probably during this century. The building and enlargement from time to time of registries of deeds and the recording and binding for accessible storage, from now till doomsday, costs the counties a great deal of money. These permanent and accessible records of the titles to land are necessary, but the volume of repeated words thus stored should be reduced as much as possible because every word takes space and costs the counties money.

For more than two hundred years many technical "words of art" which were needed, or thought to be needed, for legal purposes were recorded and stored in every county registry. In 1912 the legislature, following the work of a committee of conveyancers, passed the "short form of deeds" act which eliminated the necessity of using or recording thousands of words at public expense.

In 1945 a bill drawn by another group of experienced conveyancers was introduced as H. 365 and was referred to the Judicial Council which recommended its passage for the reasons stated in our 21st Report (pp. 22–24) and called attention to the fact that the bill had also been studied by other experienced lawyers and approved "as a carefully drawn bill." Its purpose is the same as that of the "short form of deeds" act of 1912 — a permissive act to encourage the reduction of unnecessary recording of repetitions in mortgages at public expense. We recommend its passage and suggest that pages 22–24 of our 21st Report deserve the attention of the County Commissioners in each county with a view to its support. The practical importance to the counties and to the public which pays the bills for storage and building registries, of reducing, so far as possible, these repetitions, is illustrated by the following table compiled by the Federal Home Loan Bank of Boston and published in the Banker and Tradesman for August 24, 1946, showing the number of mortgages (for not more than $20,000 each) recorded in the different counties for two years from July to July.

	1944–45	1945–46
Suffolk	7,427	10,565
Barnstable	1,194	1,611
Berkshire	1,874	3,018
Bristol	4,495	6,383
Essex	6,828	10,253
Franklin	868	1,234
Hampden	3,672	5,679
Hampshire	997	1,451
Middlesex	13,938	21,325
Norfolk	6,689	10,267
Plymouth	4,035	5,754
Worcester	6,275	9,312
Total	58,292	86,852

For the *week* ending December 7, 1946, the number of such mortgages recorded in the different registries throughout the commonwealth was 2029, and for the week ending December 14, 1836, as reported in the Banker and Tradesman for December 21 and 28, 1946.

We reccomend:

DRAFT ACT

Chapter one hundred and eighty-three of the General Laws is hereby amended by inserting after section twenty-four the following new section:—

Section 24A. A declaration of mortgage provisions signed by any person and acknowledged by him before any officer authorized by law to take acknowledgments of deeds may be filed for record in any registry of deeds and shall be recorded therein. Thereafter, all or part of such provisions may be incorporated by reference to such declaration in any mortgage relating to land, whether registered or not, which lies in the registry district where such declaration is recorded. Such incorporation by reference may be by substantially the following language:—

The provisions contained in a declaration of mortgage provisions dated and recorded with Deeds, Book page , are hereby made a part of this instrument, except so far as inconsistent with any provisions herein contained.

For the information of the mortgagor, a copy of such declaration of mortgage provisions shall be annexed to any mortgage containing a reference thereto, but such copy shall not be recorded, nor shall the failure to annex such copy invalidate said mortgage. The incorporation of provisions in mortgages by reference in any othere legal manner shall not be affected hereby.

ADOPTION WITHOUT REPORT FROM DEPARTMENT OF PUBLIC WELFARE FOR CAUSE IN DISCRETION OF THE COURT

The Council received the following request from the Probate judges of the Commonwealth:

"At a meeting of the Probate Judges of the Commonwealth of Massachusetts, held at Boston January 12, 1946, it was voted that a communication be sent to the Judicial Council to the effect that the judges would appreciate consideration by the Council of Chapter 210, Sec. 5A of the General Laws (Ter. Ed.).

"It is the feeling of the judges that much good could come from legislation to the effect that a decree for adoption of a child under the age of 14 would be effective without a report from the Department of Public Welfare, provided that the judge, for cause shown, deemed the entry of such a decree advisable.

"It has been the experience of all the Probate Judges that the Department is tremendously behind in the matter of returning reports to the Court. This is apparently occasioned by lack of investigators and a budget allowance that does not allow them to cope with the situation. In several cases the judges feel that worthwhile adoptions have failed to go through, and that they would like the authority to use discretion in the matter of waiting for these reports."

Yours very truly,

s/ Frederick J. Dillon
Secretary to the Administrative
Committee of the Probate Courts

Section 5A referred to provides that:

"Upon the filing of a petition for adoption of a child under the age of fourteen, notice shall be given to the department of public welfare which shall make appropriate inquiry to determine the condition and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, and to determine whether the petitioners and their home are suitable for the proper rearing of the child, due regard being given the race and religion of the child and of the petitioners. The department shall submit to the court not later than thirty days after receipt of such notice, or within such further time as the court may allow, such written report as will give the court full knowledge as to the desirability of the proposed adoption. The court may require such further investigation and report by the department as may be necessary. All reports submitted hereunder shall be filed separate and apart from the other papers in the case, and shall not at any time be open to inspection except by the parties, and their attorneys, unless the court, for good cause shown, shall otherwise order. *No decree shall be made upon such a petition until such report has been received, nor until the child shall have resided for not less than six months in the home of the petitioner; provided, that for good cause shown the court may, in its discretion, waive the requirement of residence.* This section shall not apply in the case of a petition for adoption presented, sponsored or recommended by any charitable corporation organized under general or special laws of the commonwealth for the purpose of engaging in the care of children and principally so engaged."

We do not think the general requirement for a report by the department should be allowed to deprive a child of the opportunity of good adopting parents simply because of lack of adequate facilities for such a report. We think the probate courts should have the same discretion in regard to reports that they have in regard to the requirement of residence for six months. We recommend the following

DRAFT ACT

The next to the last sentence in Section 5A of Chapter 210 of the General Laws is hereby amended by adding at the end thereof the words: "and for good cause shown may waive the requirement of a report."

EVIDENCE — PRIVATE CONVERSATIONS BETWEEN HUSBAND AND WIFE

The Present Statute

The present statute, G.L. (Ter. ed.) c. 233, s. 20, reads as follows:

"Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows:

"First, Except in a prosecution begun under sections one to ten inclusive, of chapter two hundred and seventy-three, neither husband nor wife shall testify as to private conversations with the other."

"Second, Except as otherwise provided (in s. 7 of c. 273) neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other."

The Chapter 273 referred to is the "Uniform Desertion Act" passed by the legislature in 1911 and providing for criminal proceedings in the district courts for desertion, non support of wife or children, etc. Section 7 of that chapter reads:

"§7. *Evidence.* — No other or greater evidence shall be required to prove the marriage of the husband and wife, or that the defendant is the parent of the child, than may be required to prove the same facts in a civil action. In any prosecution begun under section one, both husband and wife shall be competent witnesses to testify against each other to any relevant matters, including the fact of their marriage and the parentage of the child; provided, that neither shall be compelled to give evidence incriminating himself. Proof of the desertion of the wife or child, or of the neglect or refusal to make reasonable provision for their support and maintenance, shall be prima facie evidence that such desertion, neglect or refusal is willful and without just cause. In no prosecution under sections one to ten, inclusive, shall any existing statute or rule of law prohibiting the disclosure of confidential communications between husband and wife apply."

By Section 16 "this practice" as to evidence applies, not only to proceedings for non-support of wife or children, but also to proceedings for non-support of illegitimate children (see *Com.* v. *Rosenblatt*, 219 Mass. 197; *Com.* v. *Callaghan*, 223 Mass. 150; at pp. 151–152; *Com.* v. *Circo*, 293 Mass. 361; *Com.* v. *Kitchen*, 299 Mass. 7 at pp. 10–11). By Section 22 the same practice applies to proceedings for non-support of destitute parents.

On the other hand, if a civil proceeding is begun in a probate court for failure to support a wife or children, a different rule of evidence applies because of the wording of clause "First" of Section 20 of Chapter 233 first above quoted.

Ever since 1911, therefore, the most relevant evidence by those most familiar with the facts has been excluded in the probate courts and admitted in criminal proceedings in the district courts in domestic relations cases. In the opinion of the majority of the

Council there is no sufficient reason for retaining a rule which admits the facts in one court and excludes them in another.

As pointed out in "Wigmore on Evidence," 3rd. ed., Vol. II §§600–620 and Vol. VIII, sections 2332–2341 there has been a great deal of misunderstanding as to the nature and scope of the rules excluding testimony as to conversations between married persons, and the history of those rules in Massachusetts shows that such testimony was excluded in a criminal case against the husband, even although both the husband and wife wished to disclose the conversation as in the case of *Com.* v. *Cronin*, 185 Mass. 96. In that case, the court relied on the earlier case of *Fuller* v. *Fuller*, 177 Mass. 184, in which a husband seeking a divorce on the ground of desertion testified that his wife left the house and went to a hotel, where he went to see her and had a conversation. In the report of the case it appears that

> "Fuller, who testified as a witness, was asked upon his examination in chief concerning a visit which he made to his wife after she had gone to the Fitchburg Hotel on May 3. He was asked: '*Q.* No one else present when you had the conversation with your wife on May 3d at the Fitchburg Hotel? *A.* No, sir. *Q.* Did you ask her to return to your home? *A.* I did.' These questions and answers were admitted under objection and exception of Mrs. Fuller. The witness was then asked: '*Q.* Did she consent or refuse? *A.* She said she would not come and live with my family!' "

The Supreme Judicial Court said:

> "While it is true, as said in *French* v. *French*, 14 Gray 186, 188, that the word "conversation" in the statute does not include all language between husband and wife, still it must be held to include the language in this case. Here there was no abuse, no threat, no assault. It was a plain case of a conversation between husband and wife, and even if, as contended by the counsel for the husband, it was a conversation which accompanied and explained the act of the wife in going to the hotel, and her mental attitude in that act, still it was within the prohibition of the statute. The fact that the conversation accompanies and explains the act is not sufficient to take it out of the operation of the rule. *Jacobs* v. *Hesler*, 113 Mass. 157."

In the case of *Jacobs* v. *Hessler*, thus relied on, a widow sought to establish a trust, as veterans have recently sought to establish trusts in the Superior Court, and the following situation appears in the report of the case (113 Mass. at pp. 159–160).

> "The case was referred to a master to hear the parties, find the facts in issue on the pleadings, and report such portions of the evidence as either party might desire.
>
> "The master found that the money was placed in the husband's hands for the purpose, as made known to him, of having him invest it for the wife in United States bonds; that he received it for that purpose, and promised her that he would so invest it, but that he used it in his business without her knowledge, and

that it had never been repaid or returned to her. These facts were found upon the evidence, which was reported.

"But if the court should be of opinion that so much of the evidence as consisted of conversations between the plaintiff and her husband was not competent and ought not to have been admitted, then the master found that the money was the separate estate of the plaintiff; that she placed it in her husband's hands, but not for the purpose of being invested in United States bonds, or otherwise; that he never agreed to so invest it; that it was used by him in his business; but that it did not appear that it was placed in his hands to be so used, or was so used with her knowledge.

"It appeared from the evidence reported that the conversations referred to took place 'in presence of the family,' which consisted, besides the husband and wife, of five children, the oldest of whom was eleven years of age. . . .

The Supreme Judicial Court said:

The conversation between the husband and wife appears by her testimony to have been had in the presence of no other person except their family of young children, who are not shown to have taken any part in or paid any attention to the conversation. It must therefore be deemed incompetent evidence as a private conversation between husband and wife."

The court therefore decided against the widow and against the facts, although the evidence clearly showed the facts in regard to her separate property.

The rule of *Com.* v. *Cronin*, above mentioned, was also the rule in the federal courts for generations but it was considered so unjust that finally in 1930 the circuit court of appeals of the 8th circuit in an opinion by Judge Kenyon attacked it in *Tinsley* v. *United States*, 43 Fed. 2nd 890 (quoted by Wigmore, 3rd ed. §601 Vol. II, pp. 735–36) with the suggestion that:

"It is apparent that unless Congress passes some act making husband and wife competent to testify as witnesses for each other in the Federal Courts, or unless the Supreme Court passes on the question in such a way as to harmonize the Rosen and Jin Fuey Moy Cases, that many of the Federal Courts will refuse to follow this antiquated and fossilized rule of the common law, on the theory that if there ever was any reason for the same it has long since ceased to exist."

Thus stimulated, the Supreme Court of the United States in 1933 in *Funk* v. *U. S.* 290 U. S. 371, expressly overruled the old practice referred to saying in its opinion by Mr. Justice Sutherland (at pp. 380–381):

"The rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth — and the danger never was as great as claimed — its effect has been minimized almost to the vanishing point

by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is today universally accepted. *The exclusion of the husband or wife is said by this court to be based upon his or her interest in the event. Jin Fuey Moy* v. *United States, supra.* And whether by this is meant a practical interest in the result of the prosecution or merely a sentimental interest because of the marital relationship, makes little difference. In either case, a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity.

"Nor can the exclusion of the wife's testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy. It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury. Modern legislation, in making either spouse competent to testify in behalf of the other in criminal cases, has definitely rjected these notions, and in the light of such legislation and of modern thought they seem to be altogether fanciful. The public policy of one generation may not, under changed conditions, be the public policy of another. *Patton* v. *United States*, 281 U. S. 276, 306."

The results reflected in the Massachusetts statute and decisions seem to date back to the report of the Commissioners on the Practice Act of 1851 (see Hall's Mass. Practice Act of 1851 p. 154) where we find the following:

"It has been suggested that all rules of exclusion should be repealed, that parties to suits should be allowed and compelled to testify, and the husband and wife be witnesses for and against each other. In this opinion we do not concur for reasons which apply to each case.

"As regards husband and wife, we are satisfied of the propriety of the rule, which protects as confidential all that may be said or done by either when alone with the other, except so far as the personal safety of either party from violence requires its disclosure. The reasons for this must occur to every mind. We think it would materially affect this most important relation, if the parties could be compelled to appear as witnesses against each other. To allow a husband to call his wife as a witness in his own behalf, seems to us also objectionable, not so much from the danger of perjury as from the effect of influences extremely adverse to the perception and recollection of the truth."

Even in this passage they recognized the need of an exception where personal safety was involved.

It is to be noticed that in this passage the distinguished commissioners were also opposed to allowing any "parties to suits" to testify although they were the persons who knew more about the facts than anyone else. As pointed out by the court in the Funk case above quoted both the bench and bar, for generations, believed that interested litigants could not be expected to tell the truth and therefore

supported the old rule of exclusion which kept Mr. Pickwick off the witness stand in the trial of *Bardell* v. *Pickwick* in Charles Dickens' "Pickwick Papers." That rule was not abolished until 1851 in England and it lasted until 1856 in Massachusetts when the legislature decided that the Commissioners of 1851 were mistaken in believing the change to be against "the interests of justice or the public morals" (see report p. 156). Those commissioners classed the two rules of exclusion of parties and of married persons together in the statute recommended by them, which became Section 97 of the Act of 1851 and contained the clause "but this act shall not render competent any party to a suit, or proceeding, who is not now by law rendered competent, nor the husband or wife of any such party."

While, as already stated, the exclusion of parties was repealed, the clause about husbands and wives was gradually developed by more words in the course of years into the statute quoted at the beginning of this report.

In the foregoing references we have illustrated some of the unjust results of the present statute such as those which have recently reappeared in the cases arising out of the war in which returned veterans have been prevented by the rules from proving trusts of substantial amounts of money which they sent home to their wives. As illustrating further some of the illogical results we call attention to a few more cases:

In *Commonwealth* v. *Spencer*, 212 Mass. 438 Hammond, J., said:

> "As to private conversations with each other, neither husband nor wife is allowed to testify, no matter how much the testimony is desired by either of them or by any third party."

But in subsequent cases our court has held that, if a private conversation gets in without objection, it will be treated the same as any other evidence which would have been excluded, if seasonably objected to. For example:

Wireless Specialty Apparatus Co. v. *Priess*, 246 Mass. 274 was a suit in equity to enjoin breach of a contract. The defendant and his wife, both called by the defendant, testified without objection to a certain private conversation between them. Upon objection subsequently made, Rugg, C. J., after pointing out that it did not affirmatively appear that the testimony related to private conversations between the defendant husband and his wife, went on to say (at page 278):

> "For aught that is shown in this record, other persons may have heard the conversation. The defendant having introduced the testimony himself, presumably hoping to receive benefit from it, will not now be heard to contest its admissibility. The statutory prohibition was as strongly binding upon the defendant as upon anybody else. Parties cannot in the trial of causes play fast and loose with the

law of evidence and then be heard to object to their own infractions of it. By his own conduct the defendant has sealed his lips from complaint concerning this testimony. See *Doole* v. *Doole*, 114 Mass. 278; *Thompson* v. *Cashman*, 181 Mass. 36. There is no such sanctity about private conversations between husband and wife, even in view of the statute, as prevents the tribunal from considering the testimony in the circumstances here disclosed. There is nothing in *Sampson* v. *Sampson*, 233 Mass. 451, and the cases there collected, at variance with this conclusion. Incompetent evidence, when introduced without objection, is entitled to its probative force." *Com.* v. *Wakelin*, 230 Mass. 567, 576 and cases therein collected.

MacDonald's Case, 277 *Mass.* 418, was a workmen's compensation case. The widow of the deceased employee testified without objection to a private conversation she had with him. It was decided that, "having been admitted without objection, it was entitled to its probative force."

These last two cases seem, clearly, to treat the present statute as creating a privilege with respect to such private conversations; and not as an absolute disqualification, but the court has held that the present statute excludes any *private* conversations between husband and wife, regardless of whether it is intended to be *confidential* or non-confidential and, therefore, excludes a conversation "between them relating to business done by one as the agent of the other"; see *Commonwealth* v. *Hayes*, 145 Mass. 289, 293.

On the other hand, the present statute does not exclude a written communication between husband and wife, since this is not a "conversation." *Commonwealth* v. *Caponi*, 155 Mass. 534.

As to the agency case of *Com.* v. *Hayes*, it seems clear that a conversation in which a wife authorizes her husband to act as her agent, while private, can hardly be intended by either to be confidential because it contemplates an act with a third person *with authority* and *the agency* is intended to be public and not confidential. So also with the cases, mentioned of veterans establishing trusts by private conversations, the trusts and, therefore, the conversations on which the trust rests are not intended to be confidential. Their whole purpose is to establish something outside of the marriage relation and thus is not confidential.

These various rules and their unjust results and the uncertainties as to reasonable exceptions have been a subject for discussion for many years. An active practitioner in the trial of cases, writes:

> "I have felt for many years, as a result of my experience in the practice of our profession that a change is necessary in our present law governing private conversations between husband and wife, in order to prevent hardship in many cases and miscarriage of justice in others."

Other experienced lawyers share the same view with which we agree. We therefore recommend the following draft act (Mr. Muldoon dissenting).

Cross out the word "confidential" in the third line of the paragraph numbered "First" in the middle of page 75 so that it will read "a private conversation" as it correctly does in the proposed amendment at the top of the page.

DRAFT ACT

Section 20 of Chapter 233 of the General Laws is hereby amended by striking out the paragraph numbered "First" and substituting the following

"First, Persons who are, or have been married may, each, during marriage, or after termination of the marriage relation, refuse to disclose, and may prevent the other from disclosing, a private conversation between them during marriage, except in

"A prosecution under General Laws (Ter. ed.) Chapter 273, or for a crime involving an alleged breach of a duty imposed by the marital status, or for a crime arising out of an alleged injury or threatened or attempted injury to the person or property of either spouse or of a child of either or of a member of the household of either;

"A civil proceeding to which husband or wife is a party arising out of any alleged crime or threatened or attempted crime included in clause First;

"A proceeding to which husband and wife are adversary parties involving the validity or continuance of the marital status or an alleged breach of a duty imposed by the marital status; or

"A proceeding concerning property to which husband and wife are adversary parties."

and in the paragraph marked "second" by inserting after the word "provided the words herein and" so that said section will read as follows:

"Section 20. Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows:

"First, Persons who are, or have been married may, each, during marriage, or after termination of the marriage relation refuse to disclose, and may prevent the other from disclosing a confidential private conversation between them during marriage, except in

"A prosecution under General Laws (Ter. ed.) Chapter 273, or for a crime involving an alleged breach of a duty imposed by the marital status, or for a crime arising out of an alleged injury or threatened or attempted injury to the person or property of either spouse or of a child of either or of a member of the household of either;

"A civil proceeding to which husband or wife is a party arising out of any alleged crime or threatened or attempted crime included in clause First;

"A proceeding to which husband and wife are adversary parties involving the validity or continuance of the marital status or an alleged breach of a duty imposed by the marital status;

"A proceeding concerning property to which husband and wife are adversary parties;

"Second, Except as otherwise provided herein in section seven of chapter two hundred and seventy-three, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other; or

"Third, The defendant in the trial of an indictment, complaint or other criminal proceeding shall, at his own request, but not otherwise, be allowed to testify; but his neglect or refusal to testify shall not create any presumption against him.

Explanatory Notes

The proposed statute embodies those exceptions which have generally been recognized in other jurisdictions where the point has arisen. For example:

Paragraph "First" would include prosecutions for bigamy, polygamy, assault or battery upon the person of the other, or a felonious killing of the other.

Paragraph "Third" would include a libel for affirming or annulling marriage (G.L. Ter. ed. c. 207, s. 14), a libel for divorce (G.L. c. 208, s. 8), and a petition for separate support or other proceeding under G.L. c. 209, s. 32.

Paragraph "Fourth" would rectify the hardship shown by cases like *Jacobs* v. *Hesler*, 113 Mass. 157, where the widow was unable to establish a trust in her favor because of the present statute, although the master found, upon the strength of a private conversation, that such a trust existed. It would also rectify the similar injustice in the case of veterans already referred to. In both paragraphs "Third" and "Fourth" the husband and wife must stand toward each other as adversary parties in order to come within the exception. *The draft act does not authorize other litigants in cases in which the husband or wife are not interested to invade their privacy.*

All of the above exceptions rest upon the general principle that, in the interest of ascertaining the truth, the advantages of admitting such evidence outweigh the disadvantages of excluding it.

MINORITY REPORT BY MR. MULDOON

Nothing should be done to break down the barrier that protects the marital status from any disruption caused by civil or criminal proceedings. It is true that the common law disability that prevented a husband or wife from testifying in any action civil or criminal in which the other spouse was involved was based upon the theory that the interest of such a witness would be so great as to make his or her testimony practically worthless. It is not true, however, that this reason was either the only one, or, to my mind, the chief reason for this disability.

The policy in New York, and a policy with which I agree, is based upon experience which indicates that far less evil will result from the exclusion of communications and transactions between husband and wife than will result from their admission. It may in individual cases work hardship, but the destruction of confidence between husband and wife would cause much misery and seriously affect the marriage relation. "This rule is founded upon sound public policy. Those living in the marital relation should not be compelled or allowed to

betray a mutual trust or confidence which such relation involves." (*Stillman* v. *Stillman*, 187 N. Y. Supp. 383.)

The New York Act provides: —

"Except as otherwise specially prescribed a person shall not be excluded or excused from being a witness by reason of his or her interest in the event of an action or special proceeding . . . or because he or she is the husband or wife of the party thereto . . ." Civil Practice Act, Section 346.

"A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. However, if upon such trial or such hearing the party against whom the allegation of adultery is made produces evidence tending to prove any of the defenses thereto mentioned in section eleven hundred and fifty-three of this act, the other party is competent to testify in disproof of any such defense. A husband or wife shall not be compelled or, without consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff." Civil Practice Act, Section 349.

To summarize:

1. In divorce actions neither may testify against the other except:
   - *a.* to prove the marriage,
   - *b.* to disprove the allegation of adultery; or
   - *c.* to disprove any of the following defenses:
     1. Connivance
     2. Forgiveness
     3. Statute of limitations; or
     4. Adultery of plaintiff

2. In an action for criminal conversation, the plaintiff's wife may not testify for the plaintiff although she may testify for the defendant.

3. Neither may without the consent of the other testify to a confidential communication made during marriage. In divorce actions, the courts are most strict in enforcing the statutory prohibition against allowing either spouse to testify against the other except as to those matters which are expressly excepted in the statute. *Colwell* v. *Colwell*, 43 N. Y. Supp. 439.

Section 2445 of the Penal Law provides that a husband or wife of a person indicted or accused of a crime is in all cases a competent witness but neither husband or wife can be compelled to disclose a confidential communication made by one or the other during their marriage.

Confidential communications are those communications that are "expressly made confidential, or such as are of a confidential nature

or induced by the marriage relation." *Parkhurst* v. *Berdell*, 110 N. Y. 386; 18 N. E. 123.

I am of the opinion that the marital relation can best be preserved by guaranteeing that no communication which is expressly made confidential, or is of a confidential nature, or induced by the marriage relationship, should ever be disclosed under any conditions without the consent of both.

The privileged nature of such confidential communications need not be extended to all private communications between husband and wife, but I think it would be unwise to enact a piece of legislation such as has been proposed in the draft. Its purpose is understandable but the wording seems to make the act entirely too sweeping in its effect. The question involved is after all a question of public policy to be decided by the legislature, rather than a question of procedure which lies within our field.

Evidence — Commercial Lists and the Like

As pointed out in the 18th Report of the Council (p. 21):

> "Among the common objects of criticism directed at courts are the 'rules of evidence.' As said of these rules, many years ago:
>
> " 'The layman, whether his attitude be one of indignation or only of patronizing contempt sees in them a mysterious agglomeration of rules existing for their own sake in defiance of reason or common sense.'
>
> "This is not true, but it is commonly realized today that it was more true in the past, even in Massachusetts, where some forward steps were taken earlier than in other states, and there is still room for improvement."

In 1866 in the Michigan case of *Sisson* v. *Cleveland, etc., R.R. Co.* (14 Mich. 489) involving the market value of cattle, the question arose (see p. 493):

> "can the markets in New York or any other city be proved by newspaper reports or by statements of individuals made not on the market day or at the market place? — or, must they be proved by the sworn testimony of the persons who know the facts?"

The Supreme Court of Michigan, in an opinion written by Judge Cooley (later Chief Justice), said:

> "We . . . think that the court erred in excluding evidence of the state of the markets as derived from the market reports in the newspapers. The precise question involved does not appear to have been passed upon by the courts; but we are aware of no reason and no authority which would exclude the evidence . . . principle will allow the market reports of such newspapers as the commercial world rely upon, to be given in evidence. As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries; and courts would justly be the subject

of ridicule, if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."

Compare *Virginia* v. *West Virginia*, 238 U. S. 202 at p. 212.

In Massachusetts, however, under the cautiously expressed opinion in *National Bank of Commerce* v. *New Bedford* (175 Mass. 257, at p. 261) in 1900, such sources of information have not been admissible in court. For the reasons stated by Judge Cooley in 1866 we renew our recommendation of last year (21st Report p. 56) as follows:

DRAFT ACT

"Statements of facts of general interest to persons engaged in an occupation contained in a list, register, periodical, book, or other compilation, issued to the public, shall be admissible in civil cases as evidence of the truth of any fact so stated in the discretion of the court, if the court finds that the compilation is published for the use of persons engaged in that occupation and commonly is used and relied upon by them."

EVIDENCE OF REPUTATION AS TO CHARACTER

In cases involving the credibility of a witness on the question of veracity the general reputation of the witness may be introduced in evidence. The Massachusetts rule as to the nature and extent of this reputation is stated by the court in the case of *Stock* v. *Delapenna*, 217 Mass. 503 at page 506 as follows:

"The examination of the witnesses called by the plaintiff in impeachment was restricted to their knowledge of the defendant's general reputation in the community for truth and veracity. . . . It is what is said of the person under inquiry in the common speech of his neighbors and members of the community or territory of repute, from which his reputation for truth or falsehood arises, and not what the impeaching witness may have heard others say who numerically may be few and insignificant. Wigmore on Ev. §692. It is said in *Wetherbee* v. *Norris* 103 Mass. 565 that in this state no practice as a rule of law is established, but it is within the discretion of the presiding judge to require the preliminary question to ascertain whether the witness knows the general reputation for truth and veracity in the community where he lives of the person to be impeached before asking whether the witness has any knowledge, yet does not inquire as to its extent, prevents the admission of incompetent testimony, and it was followed with the approval of this court in *Commonwealth* v. *Rogers*, 136 Mass. 158. . . .

"But the evidence of Pritchard that the defendant's reputation was 'poor amongst the flour trade' and of Hermann, who had no other information than what had been gained by inquiry from people connected with, and (all in the flour business), that the defendant's general reputation for truth and veracity was 'very poor' should have been excluded for reasons sufficiently stated."

As pointed out in our 18th Report, p. 23, a bar association committee of active practitioners referred to this case and expressed the

opinion in a printed report (see *Massachusetts Law Quarterly* for April 1942) that:

"The present rule that only persons who live in the community are qualified to testify on the matter of character has long outlived its usefulness. A man may live in an apartment house where he is known by nobody and yet be well known to his business colleagues; a business associate should be able to testify as to his good reputation fully as much as people who scarcely know him at all and yet under the law as it now stands this cannot be done."

We agree with that statement and accordingly renew the recommendation in our 21st Report, p. 55 of the following draft act which we believe would be an improvement on the existing law for the reasons stated above.

DRAFT ACT

"Whenever reputation is material, evidence of the reputation of a person at a relevant time in the community in which he then resided, or in a group with whom he then habitually associated in his work or business or otherwise, is admissible."

Effect of Judgment by Agreement without a Hearing on the Merits in a Motor Vehicle Case

The recent case of *Macheras* v. *Syrmopoulos* (decided May 3, 1946, 1946 AS. 541–3) calls attention to the results of a commoh practice in the settlement of suits which we think should be eliminated for the future. As pointed out in the opinion in the case referred to:

"As a result of the decision in *Biggio* v. *Magee*, 272 Mass. 185, the Legislature on the recommendation of the Judicial Council (see 7th Report of Judicial Council 32, 33) enacted G. L. (Ter. Ed.) c. 231, §140A, as inserted by St. 1932, c. 130, §1, which reads: 'A judgment entered by agreement of the parties, the payment of which is secured in whole or in part by a motor vehicle liability bond of a motor vehicle liability policy, both as defined in section thirty-four A of chapter nineth, shall not operate as a bar to an action brought by a defendant in the action in which such judgment was entered, unless such agreement was signed by the dedendant in person.' "

The reason for the recommendation of the Council in its 7th report was as follows:

"Biggio and Magee were involved in an automobile accident and cross suits were brought. In the suit of *Magee* v. *Biggio* the latter's insurance company settled and it was alleged that without the knowledge of Biggio an agreement for judgment was signed for the defendant by the insurance company's attorney and filed. A directed verdict for the defendant in a subsequent action brought by *Biggio* v. *Magee* was sustained on the ground that the judgment in the first case was a bar to the second action.

"We do not know how often a situation arises such as that in the Biggio case but there seems no sufficient reason why it should arise at all. The purposes of any agreement giving an insurance company authority to defend do not extend beyond

the requirements of defence. Those requirements to protect both the company and the defendant in case of settlement may be covered by securing a covenant not to sue in a case settled before suit has been brought and in a case settled after suit brought by securing a covenant not to sue again and an agreement that judgment shall be entered for "neither" party in the suit which is pending. These are agreements commonly used in these cases."

"It is, nevertheless, true that an attorney for an insurance company who enters his appearance for a defendant in a damage suit in accordance with the policy agreement has apparent authority on the records of the court to agree to the entry of judgment against his client. It is reasonable that there should be some method of protection against such action unless the defendant specifically agrees to it."

In the Macheras case the judgment entered by agreement was in an action for *property* damage which is not covered by compulsory insurance. For this reason the statute of 1932 did not apply and the judgment was a bar to a subsequent suit by the *defendant* against the plaintiff in the earlier suit for personal injuries arising from the same collision. In the Macheras case the defendant in the personal injury suit Syrmopoulos was plaintiff in a prior district court suit for property damage to his car "by reason of the negligence of Macheras" (the plaintiff in the personal injury suit). It was not a case of settlement without trial because the "judge found for the plaintiff and assessed damages in the amount of $220.35." The issue of negligence was, therefore, tried and decided. "*Thereafter* the parties through their attorneys executed and filed the agreement for Judgment for the plaintiff in the sum of Two Hundred and No/100 ($200.00) Dollars, without costs, and Judgment satisfied.' "

That cut the court's finding down a little. Presumably the basis of settlement may have been a mistake as to repair bill or a threat of taking the case to the appellate division. Under such circumstances we do not think there should be a second trial on the merits, but where the settlement is made and judgment entered without any trial on the merits we see no reason why the statute should be limited to cross-suits, within the compulsory insurance act. For this reason we recommend the following:

DRAFT ACT

Section 140A of Chapter 231 of the General Laws inserted by Chapter 130 of the acts of 1932 is hereby amended by striking it out and substituting the following:

"Section 140A. JUDGMENT BY AGREEMENT IN MOTOR VEHICLE CASES. In an action brought to recover for personal injuries, consequential injuries or injury to property sustained by reason of a motor vehicle accident, a judgment entered by agreement of the parties, without a hearing on the merits, shall not operate as a bar to an action brought by a defendant in the action in which such judgment was entered, unless such agreement was signed by the defendant in person."

MOTIONS TO NONSUIT AND DEFAULT

In the act creating the Judicial Council, copy of which appears on page 4 of this report, it is provided that the "Council may also from time to time submit for the considerations of the Justices of the various courts such suggestions as to the rules of practice and procedure as it may deem advisable.

In accordance with this provision a recommendation in regard to the rules of the Superior Court was made by the Council relative to hearings on motions to nonsuit or default and failure to answer interrogatories by a letter to the chief justice of October 4, 1945. In that letter attention was called to the fact that hearings on motions to nonsuit and default in cases pending in the Superior Court is one that has caused attorneys a considerable waste of time for a number of years. It is necessary that such motions be filed and marked on the list for a certain date and then the attorney, or someone representing him, must appear and press the motion on the date that it appears on the motion list. Generally a clerk calls the list and enters a conditional order to either nonsuit or default, which is automatically removed if answers to interrogatories are filed on or before a certain date. The judge of the motion session hardly ever hears such motions and the matter is taken care of almost entirely by a clerk.

In the district courts rule number 13 covers the procedure for nonsuits and defaults and it has worked out very well and resulted in a considerable saving of time to members of the bar. The section of the rule which pertains to interrogatories is as follows:

> "If a party interrogated shall file no answers within twenty days after notice has been sent to him with a copy of the interrogatories under G. L. c. 231, sec. 63 as shown by affidavit or within such extension of time as may appear of record, or shall file no further answers within the time allowed him therefor by the court, the clerk upon written application of the interrogating party shall enter as of course against the party interrogated, with written notice thereof as provided in rule 14, a non-suit or default according to the case conditioned however that it shall be vacated by the clerk as of course if answers or further answers, as the case may be, to the interrogatories shall be filed within ten days after such entry."

Attention was called to this rule of the district courts in the communication of the Judicial Council and it was suggested that a similar rule be established in the Superior Court. The form of affidavit could be changed from the form prescribed in the district court rule so that it would substantially comply with the affidavit that is now used when a motion is placed on the list for hearing in the Superior Court. The main purpose of the rule would be to relieve attorneys from attending the motion session in order to have an order entered for either the plaintiff or the defendant to answer interrogatories within a stated time.

Notice

The Municipal Court of the City of Boston has adopted an amendment to its Rule 13 such as was here suggested.

The Municipal Court of the City of Boston follows a practice similar to that in use in the Superior Court and if a change is to be made, it was suggested that such a rule be adopted in the Municipal Court of the City of Boston, as well as in the Superior Court as all the other district courts operate under the provisions of rule 13.

A letter to this effect was sent to the Chief Justice of the Municipal Court of the City of Boston.

As this matter seems clearly within the existing rule-making authority of the courts, there appears to be no occasion for legislative action to bring about a more convenient practice involving less needless waste of time of members of the bar. Accordingly, instead of recommending legislation, we again call these recommendations to the attention of the justices of the Superior Court and to the justices of the Municipal Court of the City of Boston with the recommendation that a rule similar to that of rule 13 above quoted be adopted.

Discharge of Inmates of Veterans' Hospital — House 59

This bill (referred to the Council by resolves Chapter 14) was introduced by the Department of Mental Health, its purpose being described by the Commissioner in paragraph "3" of House 56 (containing recommendations about various matters) by the mere statement "to clarify the provisions of Section 20A of Chapter 123 of the General Laws to conform with the requirements of Chapter 123." More specifically, the proposed amendment of Section 20A would give the Commissioner of Mental Health the final say in case of any difference of opinion with the superintendent of the veterans' hospital as to whether a veteran was fit for discharge.

This question was before the Judicial Council before Section 20A was passed. The Council, at the request of the legislature, discussed, as a whole, the proposed "uniform veterans' guardianship bill" of twenty-four sections, in the 20th Report of the Council (pp. 57–61). The Council did not recommend the whole of that bill, but recommended Section 20A as its most important section (after hearing the opposition of the commissioner including the proposal, in substance, which is now contained in House 59). The Council recommended the passage of Section 20A as it now stands "to facilitate the administration of the veterans' bureau in the interest of veterans and of the public service throughout the country." (See p. 58).

The change now again proposed by H. 59 seems to us to be based on apprehensions, rather than on any demonstration of fault in the law as it stands. The Administrator of Veterans' Affairs, General Omar N. Bradley, through his authorized attorney in Massachusetts, has recorded his opposition to House 59 and we do not recommend the enactment of such legislation.

Salary of the Secretary of the Judicial Council

In the various substantial salary increases considered and enacted by the last legislature there was no provision in regard to the salary of the secretary of the Judicial Council. The Council was created in 1924. After two years of service without compensation, the salary of the secretary of $3,500.00 was first established in 1927 by Chapter 306 of that year following a recommendation in the 2nd Report of the Council (p. 69). The provision for the salary now appears in G. L. (Ter. ed.) Chapter 221, Section 34C, which is reprinted on page 4 of this Report of the Council. There has been no change in the amount since 1927 except the slight temporary increase during the recent war years under a general act relating to all salaries.

During the past nineteen years the work of the secretary has materially increased and extended to a greater variety of problems. In view of the nature of the work involved and the recent increase of other salaries fixed by statute, in the opinion of the Council, the salary of the Secretary should be increased. This opinion was communicated to the Chairman of the Committee on Judiciary too late for consideration at the last session. We, therefore, express the hope that the necessary action will be taken at the present session to take effect as early as practicable, and submit the following:

DRAFT ACT

Section 34C of Chapter 221 of the General Laws, as appearing in the Tercentenary Edition thereof, is hereby amended by striking out in the last sentence the words "thirty-five hundred" and substituting the words "five thousand" so that the sentence shall read:

"The secretary of said Council, whether or not a member thereof, shall receive from the commonwealth a salary of five thousand dollars."

As in previous reports we reprint the substance of the circular letters of the Administrative Committee of the District Courts for convenient reference as they contain information about those courts not available elsewhere and reflect the difficult but important and helpful work of that committee. The discussion of summary process (pp. 87-90) will be helpful to the bar.

The usual summary of the work accomplished by the various courts with statistical tables of details will be found in Appendix D.

Respectfully submitted,

FRANK J. DONAHUE, *Chairman*,
NATHAN P. AVERY, *Vice-Chairman*,

LOUIS S. COX,
JOHN E. FENTON,
JOHN C. LEGGAT,
WILFRED BOLSTER,
FRANK L. RILEY,
FREDERIC J. MULDOON,
SAMUEL P. SEARS,
WILFRED J. PAQUET.

APPENDIX A

Circular Letters of Administrative Committee of District Courts

The circular of January 2, 1946 contained the statistics of business for the year ending September 30, 1945 (which appeared in the 21st Report of the Judicial Council), also a reference to that report and then continued as quoted below:

Extract from Circular Letter of January 2, 1946

"COMBINATION OF DISTRICT COURTS UNDER THE PROVISIONS OF CHAPTER 677 OF THE ACTS OF 1941

"The District Court of Northern Norfolk, the District Court of Western Norfolk and the District Court of Southern Norfolk, all within the County of Norfolk, have been combined by action of the Administrative Committee as courts to join in the appointment of one probation officer to act exclusively in juvenile cases in said courts. This is the third combination of courts under the power in said chapter.

"James M. Devlin has been appointed the juvenile probation officer by this Committee. Provision has been made for his salary by a special Act of the legislature. . . .

"DETERMINATION OF NUMBER OF SIMULTANEOUS SESSIONS — AMENDMENT TO REQUIREMENT NO. III

(*Effective January 1st, 1946*)

"The number of simultaneous sessions which may be held in each of the District Courts during the calendar year 1946 has been determined as the same which were determined for the year 1945 with the following changes:

Name of Court	*Number*
First District Court of Eastern Middlesex	300
Municipal Court of Roxbury District	350
Third District Court of Bristol	150
Third District Court of Eastern Middlesex	350
District Court of Lawrence	150
District Court of Eastern Norfolk	300
District Court of Somerville	140
District Court of Newton	150
Fourth District Court of Plymouth	20

Extraordinary situations may be submitted to this Committee for appropriate action."

COMMONWEALTH OF MASSACHUSETTS
ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

July 20, 1946.

TO THE JUSTICES, CLERKS AND PROBATION OFFICERS OF THE DISTRICT COURTS:

In conformity with our usual practice, we are issuing this midyear circular letter.

THE DISTRICT COURT PROBLEM

A phrase has of late come to have a place in all discussions of the District Courts, It is "The District Court Problem." Though freely used, it is by no means as freely understood or defined.

This Committee has been actively associated with committees and commissions as well as the Judicial Council almost from its beginning (October 1st, 1922). Its activity has been almost continuous since 1933.*

The latest commission provided for in chapter 66 of the Resolves of 1945 has followed the customary procedure in holding hearings and securing information. It appears from tentative reports sent to all the judges by the Secretary that it has been unable to agree except as to a few elements, has asked to be continued and for leave to report on or before December 3rd, 1946. No good purpose will be served by digesting these tentative reports.

We have thoughtfully considered them, have talked with the members of the commission and with the officials of all our several District Courts. While we fully understand the commission has not formally agreed upon any recommendations, nevertheless and with all due respect, we feel it proper we make certain comments and recommendations.

In our opinion the weaknesses, such as they are, of the District Courts have been over-stressed. It has become popular to criticize these courts without any real knowledge on the part of most people as to whether the statement is valid or not. Broad, unqualified statements immediately lose force when doubts are expressed and questions asked. We of course never think of proclaiming that the courts are perfect but taken as a whole, they function very well. Honesty, integrity, pride in good work and a sense of responsibility are found as dominant elements in the courts as a whole. There will of necessity be exceptions. That a real system has been developed is fully shown by the amount of correspondence which flows into and out of the Administrative Committee and by the almost universal responsiveness of the personnel to suggestions and regulations of the Committee. Exceptional cases are interpreted by the ignorant or unthinking as symbolic of the whole. This view is far from the fact. Stress is laid upon the fact that some judges have a private practice. Theorectically a Judge should be a Judge only, but practically that ideal cannot fully be attained. This criticism is not universal. It is largely localized. We doubt if there is any substantial honest belief that there is any abuse by the Justices in this respect. It is refreshing to learn that the commission recognizes the injustice in the salaries paid. There has been no substantial increase for twenty-four years. The plain fact is there is no crying District Court problem, no problem which cannot be avoided by wise appointments and through the control of the Administrative Committee which has shown its sense of obligation and its willingness to deal firmly and promptly with any violations within the areas over which it functions. That control has been

(*In the 20th Report of the Judicial Council, at page 29 will be found a list of reports.)

strongly impressed upon Special Justices in particular. An inefficient member of the personnel is often the source of criticism which injures the whole system. Moreover the members of the bar are not always reasonable in their requests.

As the Commission is apparently to continue its study, we feel justified in making a suggestion: No one can understand the District Court System unless he studies the state as a whole. It is in our opinion futile to attempt to understand it without such knowledge. Opinions based upon knowledge acquired in the metropolitan area only cannot be fair or conclusive.

ACTS OF 1946

We list and analyze certain of the Acts of 1946 which are of major interest to our courts. (Here followed a list. The comments on the effect of Chapter 274 as to release of drunks is quoted on page 64 of this report.)

SERVICE OF NOTICE TO SHOW CAUSE

There appears to be a difference in the courts in the requirements for the service of Notice to Show Cause. Some of the judges require service in hand. Others are satisfied if the notice is left at the usual place of abode. The former seems the best and most satisfactory practice. The requirement of the Municipal Court of the City of Boston is a reasonable compromise. The practice there is to require a service in hand or if it is made at the last and usual place of abode that it shall appear from the return that service was made in hand to some adult member of the debtor's family. The officer's return usually states the relationship to the debtor. The judge then passes upon the validity of the service if there is any doubt it has been given to some one who would bring it to the personal attention of the debtor.

SUMMARY PROCESS ACTIONS
RENT REGULATIONS FOR HOUSING (O.P.A.)

Of all the actions in our District Courts, the most difficult and trying are now the Summary Process Proceedings. The number has grown very rapidly and the difficulties have increased correspondingly.

The regulations issued by the O.P.A. have proved difficult of analysis and application. There seems to be unfamiliarity both with our statutes and the regulations on the part of both bench and bar. An effort to clarify the whole situation may be worth while.

We assume that all the courts have document numbered 50382 issued by the Office of Price Administration. So far as we can learn, not all of them have the summary of the Provisions of Section 6 of the Rent Regulations. We are enclosing a copy of such. What follows has been prepared by the Committee with the courteous assistance of Hon. Lyman K. Clark of the Ayer Court.

The Federal Emergency Price Control Act of 1942 created an Office of Price Administrator and delegated to him extensive powers to make regulations for the carrying out of the act. Pursuant to this act, the administrator made regulations which included provisions regulating and controlling actions in state courts to evict tenants. The act and regulations when read with applicable state laws and the general law of landlord and tenant present many legal ramifications and refinements. The following are some of the points arising in such actions which have been adjudicated by state and federal courts.

(1) The constitutionality of the act and the regulations made thereunder are discussed at length in *Bowles* v. *Willingham*, 321 U. S. 503.

The duty of state courts to carry out the provisions of the acts and regulations made thereunder is discussed at much length in *Schaffer* v. *Leimberg*, Mass. 1945 A. S. 811; 62 N. E. (2nd) 193.

(2) Apart from applicable provisions of substantive law, and in addition to requirements of state statutes, the regulations created new requirements in respect to giving notices prior to the bringing of an action both to the tenant and the Area Rent Office and a further notice to the Area Rent Office of the commencement of the action (Section 6 Sub-section (d), page 8). These requirements have been held conditions precedent to suit. *Morrison* v. *Hutchins* (ka) 144 Pac (2nd) 922.

(3) Threatened violations of the act and regulations in state courts may be enjoined by a federal court on application of the administrator.

Bowles v. *Willingham* 321 U. S. 503.

Actions under 6 (a) cannot be enjoined.

Bowles v. *Lee*, 59 Fed. Supp. 639.

(4) Section 6 as amended contains one subsection (a) which specifies five grounds upon which an action for removal may be brought and a further subsection (b) providing that in certain cases not included in subsection (a) application may be made to the Administrator for a certificate authorizing the commencement of an action.

In actions under 6 (a), the notices required by subsection (d) are required. *Morrison* v. *Hutchins* (ka) 144 Pac (2nd) 922.

These actions require notice to the tenant of the *ground* on which removal is sought.

If the Office of Price Administration has issued a certificate under 6(b) permitting a landlord to sue, it renders inapplicable the general provisions of section 6 and permits the landlord to sue under the local statutes.

In actions under 6(b), no notice to the tenant of the grounds on which removal is sought is necessary.

Yoncich v. *Quinn* 3 O. P. A. 5106.

(5) Nothing in the act requires a landlord to rent his property and he is entitled to withdraw property from the rental market; and he is entitled to a certificate from the rent area director authorizing him to proceed under local law.

Taylor v. *Bowles* 145 Fed. (2nd) 833.

Emergency Price Control Act Title Sec. 4 Par (d).

(6) It is not the purpose of the regulations to hamper the alienation of property.

Glen v. *Keyes* (Utah) 154 Pac (2nd) 642.

But a certificate from the Area Rent Office authorizing suit by a *buyer* is necessary.

Edison Sav. & Loan Ass'n. v. *Stamberger* 53 N. Y. S. 2nd 578.

The buyer is entitled to such certificate from the Administrator.

Regulations Sec. 6 subs. (b), Par. 2.

(7) Good faith under Sec. 6a Par. 6 (for occupancy by landlord) is a question of fact which involves motive as well as intent to occupy. It may be tried in the State Court.

Snyder v. *Reshenk* 131 Conn. 252.

Where, however, the proceeding is by a buyer who has obtained a certificate under Sec. 6(b), the State Court has been held precluded from reviewing the decision of the administrator or receiving evidence as to family status of tenant.

Jones v. *Shields* (Cal.) 146 Pac. (2nd) 735.

(8) The act created a special Emergency Court of Appeals and gave it exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2 (Prices, Rents and Market and Renting Practices). See. 204 Par. (d).

It has been held that an eviction certificate is conclusive on all parties and that its validity can be attacked only in the Emergency Court of Appeals.

Yoncich v. *Quinn* Cal. Supreme Court June 12, 1945 2 O.P.A. 5106.

The State Court may, however, inquire whether the certificate will be used in good faith for the purpose for which it was granted.

Azelrod v. *Rappoport* 55 N. Y. S. (2nd) 467 3 O.P.A. 5099.

(9) The administrative interpretation of existing regulations is to be considered but is not conclusive on courts.

Bowles v. *Simon* 145 Fed. 2nd 344.

Schwarz v. *Trajer* 56 Fed. Supp. 930.

There are a series of notes in A. L. R. Reports which contain abstracts of many cases. The reports, volume and pages are as follows:

147 A. L. R. 1446	151 A. L. R. 1466	155 A. L. R. 1461
148 A. L. R. 1403	152 A. L. R. 1462	156 A. L. R. 1467
149 A. L. R. 1467	153 A. L. R. 1434	157 A. L. R. 1457
150 A. L. R. 1462	154 A. L. R. 1460	

There follow a few questions and answers which we think may be of value. Though not all were given by the Committee, we adopt them as expressions of our own judgment.

1. *Commencement of Suit before issuance by O. P. A. of consent.*

"The eviction certificate seems to me a condition precedent to commencing a valid action. I have found no authority whether the defense of prematurity of suit may be waived by the O. P. A. on supplemental application to it before judgment. Ordinarily prematurity of suit is matter of abatement which can be waived and I should suppose the O. P. A. could waive it upon application to it."

2. *Tenancy by the entirety.*

"It seems to me valid notices in such cases cannot be given by the wife but must be given by the husband under the law as stated in *Childs* v. *Childs*, 293 Mass. 67; and *MacNeil* v. *MacNeil*, 212 Mass. 183."

3. *Assignment of rent to buyer.*

"An assignment of past rent seems to me only an assignment of a debt but an assignment to the buyer of future rent would be a part of the estate conveyed. An eviction certificate under 6(b) seems to me necessary for the commencement of suit in such case."

4. Re: *Persons Other than Owners or Landlord.*

"In the hypothetical case of a landlord giving a written lease of premises occupied by a tenant-at-will, it seems to me that this transaction is within the prohibitions of Par. 6(a) and that the tenant-at-will is protected by the regulation. I know of no cases in point."

5. The writ in the case was dated April 2, 1946, and came up for trial on April 16th. It appeared the landlord had given the tenant a 30 day notice of eviction under the Massachusetts statute, this notice being dated October 31, 1945, and notifying the tenant to vacate at the end of the month following the date of the notice. The question was whether this was the commencement of an action sooner than the period allowed by the O. P. A. It was determined the action was not com-

menced until the date of the writ. This decision was said to be in accord with the interpretation put upon the O. P. A. regulations by the official in charge of rent control.

6. The premises were leased to a married woman who occupies a suite with her husband. One of the provisions in the lease sought to exclude the addition of any occupant during the term. The tenant gave birth to a child and the Court ruled that for the landlord to evict the tenant under such circumstances would require an interpretation of the covenant which would be contrary to public policy. No appeal was taken.

It is appropriate at this point to call attention to three Acts of the current legislature.

(1) *Chap. 43.* The Court may grant a stay of judgment and execution under sections 9 to 13 inclusive of chapter 239 of the General Laws for a period not exceeding three months. This Act became operative February 18, 1946.

(2) *Chap. 175.* Defendants on appeal in summary process cases may file a bond secured by cash or the equivalent instead of by sureties. This Act is effective August 1st, 1946.

(3) *Chap. 202.* The provisions for the termination of tenancies at will for nonpayment of rent as found in section 12 of Chap. 186 of the General Laws are repealed and a new section 12 is inserted. The Act was effective April 11, 1946.

The Committee has continued its practice of visiting the several courts, meeting always with the customary courtesies and good-will. So far as is possible, this practice will be continued in the future.

Frank L. Riley, *Chairman*,
Charles L. Hibbard,
Elbridge G. Davis
Kenneth L. Nash
Leo H. Leary

COMMONWEALTH OF MASSACHUSETTS
ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

January 2nd, 1947.

To the Justices, Clerks and Probation Officers
of the District Courts:

We are sending herewith on separate sheet the statistical compilation of the work of the District Courts for the year ending September 30th, 1946. [For this information see insert facing page 92 of this report.]

The downward trend in the volume of business, both civil and criminal, was checked. A sharp increase began at once and continued to the close of the reporting year.

A study of the foregoing statistics shows the following changes:

Civil writs entered increased from 33,009 to 38,660; contract actions from 15,027 to 15,356; Tort actions from 9,668 to 11,416; Summary process from 7,464 to 11,321. This last figure reveals the housing problem. The total number of removals to the Superior Court increased from 2,847 to 3,261; the removal of motor tort cases from 2,155 to 2,478. Small claims remained practically static 28,986 and 28,950. Supplementary process cases decreased from 11,785 to 10,990. The number of criminal

cases begun (actually the number of defendants in such cases) increased from 105,936 to 135,176. Automobile cases increased from 37,132 to 55,666; operating under the influence from 2,665 to 3,752. Drunkenness cases increased from 41,715 to 48,807. Releases of such by the probation officers were 27,122 as compared with 16,977 last year. This item represents the result of the ill-conceived amendment of the last Legislature. Evidently the invitation to four drunks free from penalty was rather generally accepted. Intoxicating liquor cases decreased from 228 to 217. There were 147 inquests as against 115. Parking tickets returned to the clerks' offices were 108,927 as against 66,492. Cases reported to the Appellate Division were 98 as against 72. There were 5,434 insane commitments. The number of juvenile cases decreased from 7,458 to 6,376. This sharp drop does not support the alarmists' statements of radio, press and speakers. There is of course a loose use of the word "juvenile" (representing to the courts a child under 17 years of age) just as there has developed an incorrect statement that a defendant "pleaded innocent." There is no such plea — properly it should be reported as "not guilty."

A perfect record in the matter of delayed decisions in civil actions was prevented by a delay of sixty days after the close of hearings in one case reported by the Clerk of the First District Court of Barnstable.

STATISTICAL COMPILATION OF WORK OF TRIAL JUSTICES

October 1, 1945 to October 1, 1946

	Criminal Cases Begun	Criminal Appeals	Drunkeness	Drunkenness Releases	Automobile Cases	Juveniles Under 17 Yrs.
North Andover	6	0	6	3	1	0
Andover	0	0	0	0	0	0
Nahant	183	0	62	29	105	7
Marblehead	105	2	64	48	17	2
Saugus	224	6	112	97	83	5
Hopkinton	0	0	0	0	0	0
Hudson	119	2	59	11	37	0
Hardwick	29	0	12	3	3	0
Barre	57	16	4	0	6	1
Ludlow	170	3	21	0	92	0

AN IMPORTANT CASE

The case of *Doherty* v. *Shea* 1946 Adv. Sh. 997 is an action of tort brought by the plaintiff against a police officer for assault and battery and false imprisonment. After verdicts for the defendants, the Supreme Judicial Court found error and ordered a new trial. There is an exhaustive statement of the several rights and obligations of a person arrested for drunkenness and of the arresting officer. No complaint for drunkenness was lodged against the plaintiff and he was never brought before the court, no formal release was signed by the plaintiff nor was there any written request for his discharge from custody. The probation officer acted without such. This case should be studied by police and probation officers.

DETERMINATION OF NUMBER OF SIMULTANEOUS SESSIONS AMENDMENT TO REQUIREMENT NO. III

(Effective January 1st, 1947)

The number of simultaneous sessions which may be held in each of the District Courts during the calendar year 1947 shall be the same as established for the year

1946 and more fully set forth in the circular letter issued by the Committee bearing date January 2, 1946. Extraordinary situations may be submitted to this Committee for appropriate action or should the volume of business increase to justify changes, application may be made to the Committee for supplementary allowances.

REPORT OF THE SPECIAL COMMISSION RELATIVE TO THE DISTRICT COURT SYSTEM OF THE COMMONWEALTH

The Committee has received tentative draft reports from the secretary of the above-named commission. It would appear that as of the date of their preparation, it had not been determined which of the two reports would be that of the majority and which that of the minority. A cursory examination indicates that as to the historical and factual portions of both, there is little change from the reports heretofore issued by said commission and by prior committees and commissions. It also appears that there is little change in the recommendations of last year. One group believes that all District Court judges should be required to devote their full time to their positions, giving up the practice of law and that they should be adequately compensated by an increase in salaries. They also believe that the existing judicial districts should be enlarged by adding adjoining districts, the judge to hold court at convenient places within the enlarged district. The recommendations of the other group are briefly that full-time judicial service should be required of the standing justices in a limited number of District Courts, with further extension of this policy as experience teaches the wisdom or impracticability of such. This group further believes that there should be additional compensation paid to all the justices beyond this group by increasing the present salaries twenty per cent. It recommends that the Administrative Committee report to the commission concerning the operation of any changes which the legislature may provide for.

It is impossible to extend this analysis as we have no assurance as to what the final report or reports will show. It is of course not for this committee to enter into any controversy over any elements of the report or the recommendations. We cannot refrain however from certain uncritical comment. It seems to us there is danger the important matters be lost sight of and buried under the mass of verbiage. A stranger could easily infer that there were no officials connected with the District Courts who regard their positions as requiring a high standard of personal honor and primary obligation to their judicial work. We know that this is an unintentional reflection. Probably nobody knows better than the committee the weaknesses such as they are. Nobody has tried harder than the committee to correct any abuses which have come to its attention, even to the extent of making ourselves decidedly unpopular with certain individuals.

Frank L. Riley, *Chairman*
Charles L. Hibbard
Elbridge G. Davis
Kenneth L. Nash
Leo H. Leary

Holyoke	344	118	86	133	7	32	72	20	0	0	38	381	1,016	10	410	347	39	3	88
Hampshire	275	100	50	99	26	14	42	13	0	0	22	402	2,210	27	625	974	99	1	40
Middlesex, 2nd Eastern	865	355	224	281	5	52	202	45	3	0	204	646	3,866	77	896	2,196	68	9	214
Berkshire, Central	374	195	51	118	10	3	39	1	0	0	90	1,033	1,958	6	558	963	87	4	56
Bristol, First	355	139	124	83	7	41	109	26	0	0	24	171	1,076	59	271	407	65	2	35
Middlesex, 4th Eastern	665	388	150	123	4	44	143	35	0	0	325	415	1,759	38	667	816	79	6	77
Newton	717	328	225	162	2	63	204	50	2	0	182	453	1,936	26	419	1,273	24	0	94
Fitchburg	284	103	61	118	2	8	46	5	2	0	48	252	1,863	22	1,316	244	36	0	70
Norfolk, Northern	614	276	195	139	4	42	183	36	2	0	165	283	1,115	22	402	352	61	0	57
Brighton	345	39	63	240	3	12	41	6	2	0	258	630	2,526	69	1,185	912	42	7	47
Franklin, Greenfield	147	38	51	58	0	11	43	8	0	0	8	196	906	3	270	275	53	18	62
Worcester, 1st Southern	208	83	59	62	4	14	49	9	0	0	20	353	1,153	35	288	526	43	1	38
Brookline	773	381	251	133	8	46	229	31	1	0	182	281	2,494	67	278	1,897	43	0	78
Bristol, Fourth	246	137	29	79	1	18	26	8	0	0	76	165	855	33	179	396	63	0	34
Plymouth, Second	362	201	62	91	8	17	58	17	3	2	93	350	1,090	22	604	251	115	0	78
Chicopee	199	64	48	85	2	12	39	5	2	0	45	182	741	4	439	227	43	6	53
Worcester, 1st Northern	205	115	50	39	1	8	45	5	0	0	39	395	927	9	529	184	59	0	25
Charlestown	278	21	162	89	6	35	127	27	0	0	156	253	5,410	74	1,416	3,479	19	3	176
Middlesex, 1st Southern	433	175	153	102	3	73	145	64	0	0	86	273	1,369	10	460	411	56	0	39
Essex, Eastern	301	186	49	61	5	17	41	14	1	0	62	114	880	22	456	184	26	0	49
Norfolk, Western	265	162	53	46	4	16	52	13	0	0	51	163	745	23	184	389	63	0	60
Middlesex, Central	266	160	66	38	2	20	59	15	0	0	55	112	406	19	171	162	40	2	43
Worcester, 2nd Southern	96	22	36	28	10	19	36	18	0	0	8	89	194	2	40	50	10	0	6
Hampden, Western	120	33	24	60	3	7	17	7	0	0	13	241	1,284	9	271	844	56	0	20
Berkshire, Northern	80	35	10	33	2	7	8	0	0	0	9	155	667	14	278	208	15	3	43
Marlborough	221	100	79	35	7	45	76	38	0	0	27	273	381	12	121	134	20	0	30
Worcester, 2nd Eastern	118	54	30	33	1	10	27	8	0	0	25	97	217	12	83	61	15	0	16
Newburyport	187	70	77	38	2	37	75	35	0	0	41	253	1,338	22	814	254	59	2	54
Plymouth, Third	155	91	26	35	3	7	24	7	0	0	29	170	612	17	258	193	75	0	20
Peabody	235	102	96	35	2	51	81	40	0	0	69	139	648	15	417	75	23	2	25
Leominster	132	63	19	49	1	3	17	0	0	0	34	69	836	8	435	241	35	0	31
Worcester, Western	155	92	49	12	2	12	40	9	0	0	38	107	274	14	108	59	26	0	15
Worcester, 3rd Southern	169	63	40	50	16	10	39	10	0	0	15	208	197	12	66	67	14	1	13
Hampden, Eastern	52	26	15	9	2	2	13	1	0	0	10	245	627	4	120	364	62	0	29
Plymouth, Fourth	157	80	35	38	4	13	33	8	0	0	25	162	791	29	338	340	61	0	83
Norfolk, Southern	173	83	47	41	2	3	43	13	1	0	34	91	363	10	97	151	13	0	44
Middlesex, 1st Northern	103	47	34	17	5	7	34	5	1	0	17	57	978	38	397	685	90	0	34
Worcester, 1st Eastern	86	25	38	23	0	24	38	23	0	0	14	39	236	1	66	75	14	2	17
Berkshire, Fourth	44	15	8	14	7	6	6	3	1	0	2	79	391	5	121	127	26	1	7
Essex, Second	79	40	26	12	1	13	25	14	0	0	15	45	404	13	245	121	35	0	12
Barnstable, First	179	97	43	35	4	12	40	10	0	0	27	170	880	12	299	215	79	0	34
Barnstable, Second	83	43	25	15	0	14	24	9	0	0	9	34	441	7	106	140	42	0	15
Berkshire, Southern	44	19	5	17	3	4	5	0	0	1	4	73	442	4	118	190	20	1	28
Natick	156	65	33	57	1	13	30	9	1	0	37	57	607	13	134	340	9	0	24
Lee	32	13	2	16	1	1	1	1	2	0	1	80	658	4	208	131	52	1	27
Hampshire, Eastern	30	18	7	4	1	4	7	4	0	0	7	36	445	10	155	187	22	1	4
Franklin, Eastern	22	12	1	3	6	0	1	1	0	0	6	45	153	4	76	77	15	5	7
Essex, Third	62	19	12	8	23	6	12	6	0	0	23	45	240	7	92	70	20	0	1
Winchendon	20	7	6	5	2	1	6	0	0	0	2	51	206	3	110	48	12	0	7
Dukes County	31	22	4	4	1	2	1	0	0	0	3	13	79	5	33	21	6	0	5
Williamstown	13	2	8	3	0	0	8	0	0	0	1	24	91	2	19	43	6	0	2
Nantucket	8	4	1	0	3	1	1	1	0	0	3	14	81	0	16	23	7	0	9
Total	38,660	15,356	11,416	11,321	567	3,261	9,836	2,478	98	10	10,990	28,950	135,176	3,118	48,807	55,666	3,752	217	6,376

ADDITIONAL INFORMATION

Neglected Children	1,244
Inquests held	147
Parking tickets returned to Clerk's offices	108,927
Drunkenness releases by probation officers	27,122
Number of Insane Commitments	5,434

STATISTICS OF THE DISTRICT COURTS OF MASSACHUSETTS FROM OCTOBER 1, 1945 TO OCTOBER 1, 1946
AS REPORTED BY THE CLERKS OF SAID COURTS.

Compiled by the Administrative Committee of District Courts

DISTRICT COURT	Civil Writs Entered	Contract	Tort	Summary Process (Ejectment)	All Other Cases	Removals to S. C. (Total of all removals)	Total Motor Tort Cases entered	Total removals of such to Superior Court	Reported to App. Div.	Appealed to S. J. C.	Supplementary Process	Small Claims	Criminal Cases Begun	Criminal Appeals	Drunkenness Total Number of Complaints	Automobile Cases (total)	Operating under influence of intoxicating liquor	Intoxicating Liquor Cases	Juvenile Cases under 17 years
Worcester, Central	2,913	1,064	1,090	712	47	352	893	277	7	1	545	1,688	7,366	39	3,108	1,373	82	15	430
Springfield	2,017	967	409	614	27	114	317	64	6	1	719	1,652	16,427	44	4,220	11,156	127	7	278
Middlesex, 1st Eastern	2,855	1,118	1,000	713	24	299	884	263	3	0	730	1,526	3,965	132	1,200	2,097	106	0	258
Roxbury	1,281	86	197	985	13	45	151	32	1	0	880	1,526	8,578	376	3,545	2,438	79	11	555
Bristol, Third	1,083	382	333	353	15	126	291	81	8	2	131	833	2,095	72	1,019	271	85	12	260
Middlesex, 3rd Eastern	2,951	1,567	771	591	22	99	681	77	11	1	597	1,377	7,290	169	2,021	4,041	113	21	418
Dorchester	990	73	340	563	14	72	270	47	2	0	689	868	3,634	152	1,494	1,345	58	10	226
Lowell	1,187	462	485	233	7	154	432	139	4	0	192	1,126	2,309	24	1,245	296	53	14	112
Bristol, Second	844	306	296	230	12	105	254	74	0	0	68	541	2,399	137	929	703	60	5	125
Essex, Southern	1,799	689	567	506	37	178	497	122	4	1	361	1,031	2,801	109	1,413	606	113	2	126
Lawrence	827	277	341	193	16	92	316	79	5	0	117	419	2,252	106	1,510	400	106	5	137
Norfolk, East	1,938	937	572	393	36	94	495	62	9	0	597	1,497	3,491	73	1,451	1,283	178	3	211
Somerville	1,441	668	289	463	21	74	185	25	2	0	901	698	2,460	85	897	353	32	0	102
West Roxbury	526	56	90	376	4	12	81	7	1	0	380	583	2,843	95	873	1,476	52	10	189
Essex, First	1,256	792	248	212	4	132	240	104	1	0	344	772	1,877	120	888	450	129	5	62
Brockton	853	339	308	193	13	56	284	41	4	1	135	449	1,807	94	1,122	413	78	1	100
East Boston	617	93	263	254	7	74	229	53	2	0	267	507	3,687	121	541	1,104	15	4	190
Chelsea	1,079	195	555	323	6	197	440	151	2	0	323	695	2,195	67	1,007	399	58	4	186
South Boston	246	20	44	179	3	16	32	11	0	0	181	260	5,245	98	1,968	2,722	33	7	195
Essex, North Central	396	139	120	127	10	38	102	36	2	0	56	238	1,393	20	692	331	33	0	41
Holyoke	344	118	86	133	7	32	72	20	0	0	38	381	1,016	10	410	347	39	3	88
Hampshire	275	100	50	99	26	14	42	13	0	0	22	402	2,210	27	625	974	99	1	40
Middlesex, 2nd Eastern	865	355	224	281	5	52	202	45	3	0	204	646	3,866	77	896	2,196	68	9	214
Berkshire, Central	374	195	51	118	10	3	39	1	0	0	90	1,033	1,958	6	558	963	87	4	56
Bristol, First	355	139	124	83	7	41	109	26	0	0	24	171	1,076	59	271	407	65	2	35

The District Courts

Post-war conditions are reflected in the figures for the past year in the following table, as compared with the previous six years. The figures for each court appear in the table opposite this page.

A Seven Year Comparison of Business Years from 1939-1946, Oct. 1 to Sept. 30
(*This table does not include the business of the Boston Municipal Court*)

For the figures as to each Court see insert facing this page.

	1939-40	1940-41	1941-42	1942-43	1943-44	1944-45	1945-46
Civil entered.....	78,152	78,966	73,723	48,242	36,001	33,009	38,660
Contract.....	30,735	31,069	29,374	22,254	17,330	15,027	15,356
Tort.....	32,759	35,133	31,760	16,978	10,332	9,668	11,416
Summ'y Process..	13,673	11,898	10,961	6,603	7,625	7,464	11,321
All other cases..	985	865	1,628	2,407	724	850	567
Rem. to S. Ct.....	12,805	13,453	12,744	6,955	3,049	2,847	3,261
Rep. to Ap. Div...	260	305	304	149	113	72	98
Appeals to S.J.C..	28	22	23	20	21	26	10
Sup. Process.....	19,155	19,878	20,985	18,538	14,639	11,785	10,990
Small Claims	40,029	45,281	52,634	40,208	33,057	28,986	28,950
Criminal cases ...	152,631	167,885	154,145	125,486	106,650	105,936	135,176
Crim. ap. to S.C..	4,372	4,637	4,057	3,527	2,859	2,609	3,118
Drunkenness.....	61,365	67,991	64,660	54,202	41,227	41,715	48,807
Op. under inf. intox. liq.	4,456	5,119	4,077	2,677	2,676	2,665	3,752
Tot. Auto. cases..	54,016	64,197	54,551	38,942	40,422	37,132	55,666
Liquor cases.....	447	488	386	387	335	228	217
Juv. cases under 17 years.....	6,071	5,855	5,918	7,063	7,207	7,458	6,376
Tot. mot. tort cases	28,533	31,190	28,425	15,165	8,994	8,251	9,836
Removals ny plf.	5,353	5,209	3,682	1,860	25		
Removals by def.	5,984	6,822	7,880	4,147	2,270		
Removals by both	33	44	28	40	1		
Total Removals	11,280	12,075	11,590	6,047	2,296	2,155	2,478
Neglected children	–	–	–	1,235	1,122	1,356	1,244
Inquests held	–	–	–	77	77	115	147
Parking Tickets returned to clerk's office.....	–	–	–	–	77,669	66,492	108,927
Drunkeness releases by prob. officers	–	–	–	–	16,369	16,977	27,122
Number of Insane Commitments..	–	–	–	–	–	–	5,434

APPENDIX B

Probate Court Appeals in Worcester, Essex, Middlesex, Norfolk, and Suffolk Counties

(Referred to on page 11 of this report)

WORCESTER PROBATE COURT

	1940	*1941*	*1942*	*1943*	*1944*	*1945*	*Six Year Total*
Appeals	7	10	8	10	8	10	53
Reservations	0	0	0	0	0	0	0
Requests for Report	6	10	4	8	8	8	44
Reports filed	6	8	3	5	6	6	34
Orders for Printing	4	5	3	3	6	3	24
Net cost of Record	$429.50	$269.60	$198.00	$574.00	$573.00	$2,612.50	$4,556.60
Appeals entered in S.J.C.	2	2	2	2	2	2	12
Terminated without opinion	0	0	0	0	0	0	0
Rescripts filed	2	2	2	2	2	1	11

ESSEX PROBATE COURT

	1940	*1941*	*1942*	*1943*	*1944*	*1945*	*Six Year Total*
Appeals	21	12	18	8	11	12	82
Reservations	0	0	0	0	0	0	0
Requests for Report	16	9	11	6	7	5	54
Reports filed	8	6	9	3	4	5	35
Orders for Printing	14	7	13	6	7	10	57
Appeals entered in S.J.C.	No Record	No Record	$959.85	$730.50	$170.50	$1,012.00	$2,872.85
Terminated without opinion	4	5	6	4	2	6	27
Rescripts filed	No Record	3	2	10	4	3	22
Decrees and orders entered							
Probate	6,835	6,624	6,899	6,932	6,934	7,474	41,698
Divorce	899	847	876	876	1,016	1,366	5,880
	7,734	7,471	7,775	7,808	7,950	8,840	47,578
Cases assigned on contested list	1,298	1,145	1,259	1,210	1,235	1,314	7,461
Cost of stenographers and Transcripts of testimony	$3,514.47	$2,404.15	$2,258.94	$1,978.25	$2,406.84	$3,140.97	$15,703.62

MIDDLESEX PROBATE COURT

	1940	*1941*	*1942*	*1943*	*1944*	*1945*	*Total*
Appeals	28	35	33	36	24	33	189
Reservations	1	1	0	2	1	1	6
Requests for Report	9	5	11	19	16	14	74
Reports filed	6	5	4	13	14	9	51
Orders for Printing	17	20	21	24	15	25	122
Net Cost of Record	$268.75	$793.80	$1,572.65	$2,691.00	$2,589.95	$1,406.40	$9,322.55
Appeals entered in S.J.C.	7	11	6	13	11	11	59
Terminated without opinion	0	1	0	1	0	0	2
Rescripts filed	7	10	7	12	8	7	51
Decrees and orders entered							
Probate	14,105	14,211	13,812	13,547	13,560	14,308	83,543
Divorce	1,843	1,952	2,192	2,227	2,437	3,005	13,656
	15,948	16,163	16,004	15,774	15,997	17,313	97,199
Cases assigned on contested list	2,381	2,516	2,633	2,565	2,571	3,192	15,858

NORFOLK PROBATE COURT

	1940	*1941*	*1942*	*1943*	*1944*	*1945*	*Six Year Total*
Appeals pending 1/1/40 in Supreme Judicial Court	5						5
Appeals	15	27	22	11	16	10	101
Reservations	1	1	1	1	0	1	5
Requests for Report	5	8	13	3	5	7	47
Reports filed	4	4	9	4	4	7	32
Orders for Printing	12	24	22	11	7	9	85
Net cost of Record	$983.30	$1,043.20	$3,553.20	$1,067.80	$359.70	$1,399.88	$8,407.08
Appeals entered in S.J.C.	7	10	8	4	4	6	39
Terminated without opinions	0	2	2	1	1	2	8
Rescripts with opinions filed	12	9	6	3	3	4	37
Appeals pending 1/1/46 in S.J.C.							4
Decrees and orders entered							
Probate			5,701	6,674	6,623	10,039	29,037
Divorce			803	784	958	1,262	3,807
			6,504	7,458	7,581	11,301	32,844

SUFFOLK PROBATE COURT

	1940	*1941*	*1942*	*1943*	*1944*	*1945*	*Total*
Reservations	0	1	0	1	2	0	4
Number of Appeals and Reservations paid for	10	12	5	15	7	8	57
Net cost of Record	$2,348.50	$2,836.00	$270.50	$3,739.00	$1,729.00	$2,066.50	$12,989.50
Decrees and orders entered							
Probate	17,644	16,485	15,458	15,825	17,347	17,202	99,961
Divorce	1,969	2,274	2,399	2,620	2,968	3,504	15,734
	19,613	18,759	17,857	18,445	20,315	20,706	115,695

APPENDIX C

TEXT OF PRESENT NEW JERSEY TAX RECEIVERSHIP LAW

(*Referred to on page 30 of this report*)

"54:5–53.1. Whenever a municipality has heretofore or shall hereafter become the purchaser of any lands at any tax sale and the certificate of sale has been or shall be recorded in the manner provided by chapter five of Title 54 of the Revised Statutes, such municipality shall be entitled to immediate possession of the property sold and described in the certificate and to all the rents and profits thereof while the holder thereof, until redemption, but all rents and profits collected by such municipality shall be credited on the amount due upon said certificate of tax sale and for subsequent taxes, assessments or other municipal charges assessed against said lands and when the total amount due for the same, including all interests and costs, has been paid, the said lands shall be redeemed from said tax sale.

"Whenever a municipality shall take possession of any property pursuant to the provisions of this section, the collector of taxes or other officer thereof, whose duty it shall be to collect taxes therein, shall take possession of said property and collect the rents and profits thereof for said municipality and, with the approval of the governing body of said municipality, may designate any competent person to act as the agent of said municipality for the collection of the rents and profits of said property and for the management of the same and such person shall account promptly to such collector or other officer, and the collector or other officer shall account promptly to the municipality, for the rents and profits so collected.

"No fees shall be allowed to such collector or other officer from the rents and profits collected from such property but he shall be allowed such expenses in connection with the operation and management thereof, including proper compensation to said agent, as the governing body of such municipality may deem necessary to secure the greatest income therefrom.

"Such municipality and its officers, agents or employees shall not be liable or accountable to the owner or to any other person having an interest in said property for failure to collect rents or profits therefrom but said officers, agents or employees shall remain so liable and accountable to said municipality and such municipality and its officers, agents or employees shall not be liable for injury to said property or to the person or property of any other person from the use of the property for the purposes of this section, any law to the contrary notwithstanding. L. 1942, c. 54, p. 292, s. 1 as amended L. 1943, c. 144, p. 393, s. 1. Approved and effective April 8, 1943."

APPENDIX D

Summary of the Work Accomplished by the Various Courts

The act creating the Judicial Council (reprinted at the beginning of this report) provides that the Council shall study "the work accomplished and the results produced by the judicial system and its various parts" and "shall report annually upon the work of the various branches."

The annual periods reported by the different courts are not the same, some reporting for the last calendar year while others report from June 30 to June 30, or from September 1 to September 1, etc. The details as to counties appear below.

Supreme Judicial Court (Full Bench Cases)

During the court year from September 1, 1945, to August 31, 1946, the Supreme Judicial Court decided 217 cases with opinions and 28 cases by rescripts which were not accompanied by opinions; one advisory opinion and one answer were transmitted to the House of Representatives. These cases are reported beginning in 318 Mass. at page 504 and ending in 320 Mass. at page 154 and Supplement.

The table of full-bench cases since 1875 appears on page 71 of the 15th Report. The usual table of business, other than full-bench cases, with more detailed statements from Suffolk County appears below.

SUPREME JUDICIAL COURT ENTRIES FOR ALL COUNTIES

For the Year Beginning September 1, 1945, through August 31, 1946

(Not including full bench cases)

	Equity	Transferred to Superior Court	Referred to Masters or Auditors	Prerogative Writs	Petitions for Admission to Bar	Other Proceedings
Barnstable	—	—	—	—	—	—
Berkshire	—	—	—	—	—	4
Bristol	—	—	—	—	—	1
Dukes	—	—	—	—	—	—
Essex	3	3	—	1	—	2
Franklin	—	—	—	—	—	—
Hampden	2	2	—	6	—	—
Hampshire	—	—	—	—	—	1
Middlesex	4	—	—	3	—	—
Nantucket	—	—	—	—	—	—
Norfolk	2	1	—	—	—	—
Plymouth	—	—	—	—	—	—
Worcester	—	—	—	2	—	2
Totals	11	6	—	12	—	10

SUPREME JUDICIAL COURT FOR THE COUNTY OF SUFFOLK

REPORT FROM SEPTEMBER 1, 1945 TO SEPTEMBER 1, 1946

Transferred to Superior Court	Referred to Masters or Auditors	Prerogative Writs	Petitions for Admissions to the Bar
3	0	21	599

Law Docket	
Petitions for Admission to the Bar	599
Petitions for Writs of Error	11
Petitions for Writs of Mandamus	6
Petitions for Writs of Habeas Corpus	2
Petitions for Writs of Prohibition	2
Informations in the nature of Quo Warranto	2
Petitions by Bar Association (Disciplinary Actions)	2
Appeals from decision of Appellate Tax Board	36
Application for discharge under G. L. Chap. 123, s. 91	1
In re "Fraudulent Practices" (Reports of Com'rs. filed)	4
Total Entries on Law Docket	665
Equity Docket	
Informations by Attorney General (for failure to file returns, etc.)	704
Petitions for Dissolution under G. L. c. 155, s. 50A (about 1075 corporations)	2
Petitions in Equity	6
Petitions for Voluntary Liquidation	6
Petition for Suspension of Decree of Superior Court	1
Petitions under G. L. c. 112, s. 64	2
Petition under G. L. c. 112, s. 73a	1
Bills in Equity	7
Bills of Complaint	6
Total Entries on Equity Docket	735
Total Entries on both Dockets	1,400

THE SUPERIOR COURT

This court consists of a chief justice and thirty-one associate justices. It has unlimited civil and criminal jurisdiction and holds sessions in all of the fourteen counties. It is the only court sitting with juries. The tabulated returns of the clerks under St. 1936, Chap. 31, §3 for the year ending June 30, 1945, will be found on pp. 00–00.

To have a true picture of the work of the trial sessions one must take into consideration many cases settled during trials and others nonsuited or defaulted. An example is Suffolk County where a case is deemed tried only when a trial results in a verdict or disagreement. Over 66 per cent of all civil cases tried are tried in this county.

Motion sessions are held regularly in Suffolk, Middlesex, Worcester, Hampden and Essex and Norfolk Counties. In other counties motions are considered at jury-waived sessions. Many questions are considered by the court at these sessions.

The returns do not indicate how many cases were continued indefinitely because of absence of a party in the military or naval services.

Pre-trial sessions were held in Suffolk, Hampden and Worcester Counties during the year as follows:

PRE-TRIAL SESSIONS OF SUPERIOR COURT — SUFFOLK COUNTY
JULY 1, 1945 TO JULY 3, 1946

Number of cases on pre-trial list	4,931
Number of cases pre-tried	3,042

Number of cases settled by agreement*	907
Number of cases nonsuited	61
Number of cases defaulted	41
Number of cases disposed of by nonsuit and default, or discontinued	7
Number of cases referred to auditors	13
Number of cases where jury was waived	184
Number of cases continued	655
Number of cases to trial lists (short lists)	1,493
Number of cases from pre-trial lists settled on trial lists (short lists)	1,016
Number of days Court sat for pre-trial	159

*No separate figures for cases actually settled at pre-trial.

PRE-TRIAL "DISPOSITIONS"
JULY 1, 1945 TO JULY 3, 1946

Cases on Pre-trial List			4,931
Cases Pre-tried	3,042		
Cases not Pre-tried	1,889		
Cases Pre-tried and Settled while awaiting trial	1,016		
Referred to Auditors	13		
Sent to Trial Sessions	1,677		
Awaiting trial	336		
		3,042	
Cases not Pre-tried			
Settled	907		
Nonsuits	61		
Defaults	41		
Nonsuits and defaults	7		
Continuances	655		
Cases continued and ordered on Non-triable docket	218		
		1,889	
Total Pre-trial "Dispositions"			4,931

PRE-TRIAL SESSIONS OF SUPERIOR COURT — HAMPDEN COUNTY
SEPTEMBER 1945 TO AND INCLUDING MAY 1946

Number of cases on pre-trial lists	1,469
Number of cases pre-tried	808
Number of cases settled by agreement at pre-trial	93
Number of cases nonsuited	4
Number of cases discontinued	2
Number of cases referred to auditors	4
Number of cases where jury was waived	13
Number of cases where military affidavits were filed	20
Number of cases ordered on non-triable docket	32
Number of cases ordered to subsequent pre-trial lists	493
Number of cases to trial lists (short lists)	808
Number of cases from pre-trial lists settled on short lists	294
Number of days Court sat for pre-trial	22

PRE-TRIAL SESSIONS OF SUPERIOR COURT — WORCESTER COUNTY
SEPTEMBER 1, 1945–AUGUST 31, 1946

Number of cases on pre-trial list	1,431
Number of cases pre-tried	783
Number of cases settled by agreement at pre-trial	53
Number of cases non-suited	6
Number of cases defaulted	1
Number of cases disposed of by non-suit and default or discontinued	9
Number of cases where jury was waived	25
Number of cases continued	540
Number of cases to trial lists (short lists)	520
Number of cases from pre-trial lists settled on trial lists (short lists)	252
Number of days Court sat for pre-trial	18

APPELLATE DIVISION, SUPERIOR COURT

FOR THE REVIEW OF CERTAIN SENTENCES TO THE STATE PRISON AND REFORMATORY FOR WOMEN

APPEALS FROM SENTENCE IN INDICTMENT CASES UNDER ST. 1943, CH. 558, November 1, 1945-October 31, 1946

Number of Defendants Filing Appeals	73	Number of Defendants Filing Requests to the Appellate Division for leave to Appeal	17
Sentences Modified	21	Granted	15
Sentences Increased	1	Denied	2
Appeals Dismissed	51		
Appeals Withdrawn	5		
Pending, Oct. 31, 1946	5		

Note: There was more than one sentence in some cases.

APPEALS UNDER ST. 1945, CH. 437 (WHICH EXTENDED THE APPEAL TO PRIOR SENTENCES) — From July 20, 1945-October 31, 1946

Number of Defendants Filing Appeals		196
Sentences Modified	63	
Sentences Increased	2	
Appeals Dismissed	149	
Appeals Withdrawn	5	
Pending, October 31, 1946	None	

Note: There was more than one sentence in some cases.

Since October 31, 1946, *23* appeals have been filed under St. 1943, Ch. 558, and *3* appeals under St. 1945, Ch. 437.

The division consisting of 3 Justices sat *54* days.
December 13, 1946.

References to Auditors and Masters in the Superior Court

Calendar Year 1941 and 1945

County	1941	'42	'43	'44	'45	'41	'42	'43	'44	'45	'41	'42	'43	'44	'45
	Auditors other than for Motor Vehicle Torts					Master					Auditors for Motor Vehicle Torts				
Barnstable	11	7	4	–	6	5	3	2	–	1	–	–	–	–	–
Berkshire	5	11	4	7	3	4	10	7	5	6	1	4	–	–	–
Bristol	17	19	6	2	4	22	24	11	7	11	18	8	–	–	–
Essex	33	13	9	8	2	32	25	10	7	6	80	14	5	–	–
Franklin	2	4	2	–	–	5	2	1	–	2	–	–	–	–	–
Hampden	39	33	26	15	6	20	11	8	5	3	137	68	–	–	–
Hampshire	2	7	–	–	–	3	5	–	1	1	–	–	–	–	–
Middlesex	130	20	6	2	6	73	44	7	4	6	391	107	–	–	–
Norfolk	13	6	3	5	7	20	12	–	–	1	112	45	2	–	–
Plymouth	2	2	2	3	–	8	11	6	8	6	9	6	–	–	–
Suffolk	114	78	5	23	9	165	77	31	24	22	540	405	2	–	–
Worcester	73	91	35	18	5	41	23	23	11	4	56	201	2	2	–
	441	291	102	83	48	398	247	107	72	69	1,344	858	11	2	–

Two or more cases tried together are counted as one reference.

Appointment of Auditors in motor tort cases was practically discontinued on November 1, 1942.

Expenditures Auditors and Masters

Calendar Years 1940–1945

	1940	1941	1942	1943	1944	1945
Barnstable	$1,349.00	$3,760.00	$2,954.80	$362.50	$387.50	$231.25
Berkshire	1,407.52	872.41	1,656.25	2,185.25	1,566.91	1,736.38
Bristol	12,166.77	10,665.00	5,597.50	3,347.50	2,362.06	3,071.26
Bukes County	–	–	50.00	75.00	–	–
Essex	20,759.30	18,353.05	6,042.83	3,403.52	905.73	1,250.00
Franklin	1,015.00	775.00	372.50	280.00	–	335.15
Hampden	15,404.24	10,016.74	6,429.30	2,765.00	2,318.07	1,492.50
Hampshire	1,603.50	507.50	2,140.25	267.50	111.45	171.25
Middlesex	28,940.01	35,590.02	24,870.87	5,403.28	4,791.25	2,822.50
Nantucket	–	–	–	–	–	–
Norfolk	8,078.78	9,657.50	5,636.25	1,045.00	648.75	1,100.00
Plymouth	9,350.50	4,086.25	2,850.50	1,423.75	3,539.33	3,441.25
Suffolk	92,243.60	69,464.09	48,574.50	25,902.68	11,420.75	11,125.50
Worcester	13,463.25	13,102.25	15,415.35	10,386.20	3,786.25	2,167.62
	$205,790.47	$176,849.81	$122,590.90	$56,847.18	$31,838.05	$23,944.66

Note. In Suffolk County these figures apply to the Superior Court (Civil) only. In other counties to all Courts.

JURY CASES ADVANCED FOR TRIAL AND TRIED DURING YEAR ENDING JUNE 30, 1946

	Original Entries	Removed Cases	Total Advanced Cases Tried
Barnstable	1	–	1
Berkshire	2	–	2
Bristol			
Taunton	2	–	2
New Bedford	3	5	9
Fall River	2	3	5
Essex			
Salem	1	2	3
Lawrence	–	1	1
Newburyport	–	–	–
Franklin	–	–	–
Hampden	18	1	19
Hampshire	–	–	–
Middlesex			
Cambridge	19	5	24
Lowell	–	–	–
Norfolk	4	4	8
Plymouth			
Plymouth	2	–	2
Brockton	–	1	1
Suffolk	41	56	97
Worcester			
Worcester	7	4	11
Fitchburg	–	–	–
Total	102	82	184
Totals 1944–45	155	90	225
Totals 1943–44	100	180	280
Totals 1942–43	145	610	755

LAND COURT

This is a court of three judges created in 1898 for the registration of title to land and since then developed by additional extensions of jurisdiction both at law and in equity into the court in which almost all litigation regarding title to land takes place in addition to its original function of a court for the registration of title.

LAND COURT FIGURES FROM JULY 1, 1945 to JUNE 30, 1946

Registration Cases	470
Confirmation Cases	6
Post Registration Cases	949
Tax Lien Cases	1,097
Miscellaneous Cases	173
Equity Cases	523
Total cases entered	3,220
Decree plans made	285
Subdivision plans made	442
Total plans made	727
Total appropriation	$123,984.00
Fees sent State Treasurer	48,107.53
Income from Assurance Fund applicable to expenses	10,585.68
Unexpended balance	377.05
Net cost to Commonwealth	64,536.69
Assurance Fund Nov. 30, 1940	302,099.76
Assessed value of land on petitions for registration, confirmation	7,495,223.10

CASES DISPOSED OF BY FINAL ORDER DECREE OR JUDGMENT BEFORE HEARING

Land Registration	281
Land Registration—Supplementary	949
Tax Foreclosure	1,413
Equity, Real Actions & Miscellaneous	636
Total cases disposed of	3,279

When the state changed its fiscal year the Land Court changed its statistical year to coincide with it. Therefore, the figures are not on a calendar year basis as in previous reports.

PROBATE COURTS

There is a probate court in each county with jurisdiction of wills, trusts, settlement of estates, guardianship, adoption, change of name, divorce and separate maintenance and a variety of other matters. There are three judges in Suffolk, two in Middlesex, two in Essex, two in Worcester and one in each of the other counties.

The report prepared by the Administrative Committee of the Probate Courts for the year 1945 appears on page 122.

THE MUNICIPAL COURT OF THE CITY OF BOSTON

This court consists of a chief justice and eight associate justices, all full time judges. There are also six special justices. The tables showing the *details* of the civil business for the year 1945-6 will be found on pp. 108-109. The comparative table of civil business from 1913 to 1939 will be found in the 15th. Report, p. 65. The condensed civil and criminal business and other information for the year 1945 and the first 9 months of 1946 is as follows:

MUNICIPAL COURT OF THE CITY OF BOSTON

CIVIL ACTIONS (OTHER THAN SMALL CLAIMS CASES) 1945–46

YEAR	Entered	Removed	Per Cent	All Defaults	Per Cent of Entries	Tried	Per Cent of Entries	Total Plaintiff's Judgments	Average Plaintiff's Judgments Contract only	Heard, Appellate Division	Per Cent of Entries	To Supreme Judicial Court
1945	11,172	467	4.18	4,705	42.11	1,122	10.04	$1,207,772.23	168.63	24	2.14	3
1946 9 Mos.	9,111	340	3.73	3,641	39.96	906	9.94	1,025,918.20	163.05	16	1.76	–

The jurisdictional limits in civil cases from 1866 to 1877 were $300; from 1877 to 1894, $1,000; from 1894 to 1922, $2,000; from 1922 to September 1, 1929, $5,000; since 1929, the jurisdiction has been unlimited in amount.

SUBDIVISION—CONTRACT AND TORT—1945-1946

YEAR	ENTERED		REMOVED				TRIED	
	Contract	Tort	Contract	Per Cent of Entries	Tort	Per Cent of Entries	Contract	Tort
1945	7,291	3,134	176	2.4	282	8.9	477	447
1946 9 Mos.	5,793	2,623	148	2.5	186	7.0	323	384

TORT ENTRIES, REMOVALS AND TRIALS

1944

TORTS ENTERED		TORT REMOVALS		TORTS TRIED	
Motor Vehicle	2,318	Motor Vehicle, Plff.	10	Motor Vehicle	336
Other Torts	886	Motor Vehicle, Deft.	242	Other Torts	212
		Other Torts	49		
Total	3,204	Total	301	Total	548

1945

TORTS ENTERED		TORT REMOVALS		TORTS TRIED	
Motor Vehicle	2,163	Motor Vehicle, Plff.	1	Motor Vehicle	276
Other Torts	971	Motor Vehicle, Deft.	263	Other Torts	171
		Other Torts	18		
Total	3,134	Total	282	Total	447

1946 (9 Months January 1 to October 1)

TORTS ENTERED		TORT REMOVALS		TORTS TRIED	
Motor Vehicle	2,021	Motor Vehicle, Plff.	–	Motor Vehicle	255
Other Torts	602	Motor Vehicle, Deft.	171	Other Torts	129
		Other Torts	15		
Total	2,623	Total	186	Total	384

Summary Process (Ejectment) Entries

1944	318
1945	423
9 months of 1946	370

Supplementary Process Entries

1944	1,716
1945	1,712
9 months of 1946	1,330

SMALL CLAIM DIVISION

	1945			1946 January - Sept. 30		
	Contract	Tort	Total	Contract	Tort	Total
Actions Entered	931	169	1,100	548	254	802
Actions Settled	113	30	143	72	44	116
Counter-Claims or Set-offs	3	1	4	3	–	3
Trials	204	133	337	151	104	255
Reserved	91	57	148	46	56	102
Finding for Plaintiff	159	98	257	117	89	206
Finding for Defendant	45	35	80	34	31	65
Judgments by Default	330	52	382	292	60	352
Judgments by Non-Suit	5	7	12	12	5	17
Amount of Plaintiff's Judgments	$13,721.04	$1,767.18	$15,488.22	$10,907.30	$2,278.51	$13,185.81
Transferred to Regular Civil Docket	2	5	7	1	–	1
Removed to Superior Court	1	2	3	1	3	4
Executions	319	92	411	235	79	314
Amount of Plaintiff's Claims	$22,265.91	$5,559.34	$27,825.25	$14,410.75	$7,574.77	$21,985.52
Notices Returned Unclaimed	202	3	205	126	13	139

THE MUNICIPAL COURT OF THE CITY OF BOSTON

Criminal Business

October 1, 1945 to September 30, 1946

Cases begun	32,099	Traffic cases (includ. auto vio.)	15,006
Discharged, nol prossed, filed	7,411	Domestic relations	427
Pleas guilty	21,178	Not arrested, default, pending	1,656
Pleas not guilty	2,869	Automobile violations	1,512
Finding of not guilty	855	Automobile appeals	36
Held for Grand Jury	694	Traffic violations	13,494
Appeals	784	Traffic appeals	58
Court drunkenness	5,249	Cases reported for inquest	36
Drunks released by Prob. Officer	6,269	Inquests held	3
General cases	15,104	Search warrants	152

Parking Law

(Chap. 90 Sec. 20A, Chap. 368 of 1934. Revised Chap. 176, Acts of 1935, Amended Chap. 201 of 1938)

October 1, 1945 to September 30, 1946

Tags issued to police	113,500
Tags turned in as issued by police to violators	107,573
Total cash paid in tag office	$36,000.00

Boston Juvenile Court

The Boston Juvenile Court, created in 1906, is a separate court with jurisdiction in juvenile cases in the central district of Boston. It has one judge and two special justices.

Entries for the Year Ending September 30,	*1942*	*1943*	*1944*	*1945*	*1946*
Delinquent	498	755	813	788	647
Juvenile Criminal	4	18	9	7	3
Wayward	3	2	2	0	0
Neglected	69	97	73	105	73
Adult Criminal	12	9	43	47	80
Total	586	881	940	947	803
Active probationers as of Sept. 30	236	265	213	286	352

In connection with these figures, it should be remembered that in most cases the boy is placed on probation or otherwise kept under supervision by the court through the probation officer over a long probation period, and that in addition to the "cases" of new complaints entered on the docket and reported in the annual returns to the Department of Correction, the advice and assistance of the judge and probation officers is constantly sought by parents in informal conferences in cases which do not reach the stage of formal complaint by any one.

The Other District Courts

In addition to the Municipal Court of the City of Boston there are seventy-two other district courts in different parts of the Commonwealth. Each has one standing justice and from one to three special justices, the number varying with different courts.

The statistical table showing the business of all these 72 courts, prepared by the Administrative Committee of the District Courts, will be found facing page 92. Practitioners in District Courts should examine Appendix E, pp. 71 of the 19th Report and Appendix B of the 21st Report and Appendix A of this Report for the Circular Letters of the Administrative Committee.

Trial Justices

There are ten trial justices. Their business will be found on page 91.

The Industrial Accident Board
January 1, 1945 to December 31, 1945

Of the 297,936 accident reports filed with the Department during the year 1945, 57,243* were for injuries which caused the loss of at least one day or one shift; 209* cases resulted in death, 23* in permanent total disability, 1,145* in permanent partial disability, and about 37.9 per cent represent a temporary disability of more than one week.

* These figures are subject to slight changes because the statistical cards are now in the process of tabulation and corrections may be necessary.

A total amount of $12,757,572.54† was paid out in compensation and medical benefits under the Workmen's Compensation Act. Insurers paid out $11,522,949.01; self-insurers paid out $904,241.18; and the governmental units which have accepted the provisions of the Act, paid out $330,382.35.†

† This figure is subject to correction because two governmental units have not yet filed their report.

The cost to the Commonwealth to administer the law for this year was $342,847.12.

The Department received the sum of $177.00 for certified copies of records.

Appellate Tax Board

The Appellate Tax Board is an administrative tribunal, to which have been transferred some of the functions formerly imposed on the Superior Court. It came into existence under St. 1937, c. 400, on May 29, 1937, succeeding the old Board of Tax Appeals which was abolished.

The annual business of this board and its predecessor from 1931 to 1942 will be found on page 91 of the 18th Report. The figures since the reorganization in 1937 are as follows:

SUMMARY OF REAL ESTATE TAX APPEALS SINCE BOARD WAS REORGANIZED IN 1937
COMBINED FORMAL AND INFORMAL PROCEDURES

THE STATE (*taken as a whole*)	1937	1938	1939	1940	1941	1942	1943*	1944	1945	1946
Appeals pending at beginning of year	6,078	7,746	9,702	10,894	11,998	9,768	7,979	10,219	10,021	12,077
Appeals entered (net) during year	5,775	6,400	7,134	8,210	8,798	7,188	7,703	6,978	6,734	6,676
Total number before Board during year	11,853	14,146	16,836	19,104	20,796	16,956	15,682	17,197	16,755	18,753
Less: Settled or withdrawn during year	3,433	3,520	4,749	5,647	9,095	7,024	4,381	5,985	4,082	5,667
Net total to be decided by Board	8,420	10,626	12,087	13,457	11,701	9,932	11,301	11,212	12,673	13,086
Appeals decided by Board during year	674	924	1,193	1,459	1,933	1,953	1,082	1,191	596	871
Appeals pending at end of year	7,746	9,702	10,894	11,998	9,768	7,979	10,219	10,021	12,077	12,215
BOSTON										
Appeals pending at beginning of year	4,372	5,307	7,055	8,191	9,085	7,776	6,433	7,902	8,144	10,219
Appeals entered (net) during year	3,697	4,177	4,675	5,101	5,836	4,982	5,442	5,194	5,245	5,618
Total number before Board during year	8,069	9,484	11,730	13,292	14,921	12,758	11,875	13,096	13,389	15,837
Less: Settled or withdrawn during year	2,460	2,048	2,891	3,312	5,826	4,780	3,137	4,110	2,733	4,146
Net total to be decided by Board	5,609	7,436	8,839	9,980	9,095	7,978	8,738	8,986	10,656	11,691
Appeals decided by Board during year	302	381	648	895	1,319	1,545	836	840	437	619
Appeals pending at end of year	5,307	7,055	8,191	9,085	7,776	6,433	7,902	8,146	10,219	11,072
OUTSIDE										
Appeals pending at beginning of year	1,706	2,439	2,647	2,703	2,913	1,992	1,546	2,317	1,877	1,858
Appeals entered (net) during year	2,078	2,223	2,459	3,109	2,962	2,206	2,261	1,784	1,489	1,058
Total number before Board during year	3,784	4,662	5,106	5,812	5,875	4,198	3,807	4,101	3,366	2,916
Less: Settled or withdrawn during year	973	1,472	1,858	2,335	3,269	2,244	1,244	1,875	1,349	1,521
Net total to be decided by Board	2,811	3,190	3,248	3,477	2,606	1,954	2,563	2,226	2,017	1,395
Appeals decided by Board during year	372	543	545	564	614	408	246	351	159	252
Appeals pending at end of year	2,439	2,647	2,703	2,913	1,992	1,546	2,317	1,875	1,858	1,143

*Fiscal year 1943 covered only 7 months (Acts of 1941, Chap. 509).

MUNICIPAL COURT OF THE CITY OF BOSTON FOR CIVIL BUSINESS

Summary, 1945

	Actions Entered—Total	Actions Removed to Superior Civil Court—Total	Actions Defaulted	Ints. Filed		Marked for		Trial List				Findings		Appellate Division											
				To Plaintiff	To Defendant	Motion List	Trial List	Non-Suits	Defaults	Tried	Reserved	For Plaintiff	For Defendant	Requests for Report	Reports Allowed	Reports Dis-Allowed	Petitions to Establish	Reports Proved	Cases Heard	Cases Decided	Affirmed	Reversed	Modified	Entire Re-Trial Ordered	Partial Re-Trial Ordered
Contract.....	7,291	176	4,262	173	739	—	—	—	—	477	218	410	85	28	14	5	2	—	11	8	6	—	—	2	—
Tort.....	3,134	282	211	1,895	993	—	—	—	—	447	340	254	177	14	6	1	—	—	11	9	8	—	—	1	—
Contract or Tort	260	4	21	64	58	—	—	—	—	40	37	—	11	14	7	5	4	2	2	2	2	—	—	—	—
All Others.....	487	5	211	—	3	—	—	—	—	158	37	111	39	—	—	—	—	—	—	—	—	—	—	—	—
Totals.....	11,172	467	4,705	2,132	1,793	5,578	6,806	145	429	1,122	632	775	312	56	27	11	6	2	24	19	16	—	—	3	—
1946 — January 1 – October 1 — 9 Months																									
Totals.....	9,111	340	3,641	1,957	1,702	2,836	5,755	109	278	906	540	618	297	42	14	6	2	—	16	15	12	3	—	—	—

MUNICIPAL COURT OF THE CITY OF BOSTON FOR CIVIL BUSINESS

Summary, 1945—*Continued*

	Appellate Division—Con.							Defendants' Judgments					Neither Party by Agreement	Plaintiffs' Judgments							Executions Issued	Actions Transferred under Chapter 369, Acts 1943
	Motions	Cases Consolidated Under Stat. 1935 C. 483	Appeals to Supreme Judicial Court	Appeals to Supreme Judicial Court—Perfected	Appeals to Supreme Judicial Court—Affirmed	Appeals to Supreme Judicial Court—Reversed	Appeals to Superior Civil Court	Entered by Non-Suit	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Defendants' Judgments		Entered by Default	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Plaintiffs' Judgments	Amount of Plaintiffs' Judgments	Average Amount of Plaintiffs' Judgments		
Contract.....	3	5	4	2	—	—	1	20	19	63	16	118	282	4,034	240	170	778	5,222	$880,607.37	$168.63	4,508	—
Tort.....	19	33	5	1	1	—	3	82	31	149	67	329	213	5	76	178	1,666	1,925	327,163.86	169.95	386	94
Contract or Tort	—	—	—	—	—	—	—	3	3	7	1	14	4	—	—	—	—	—	—	—	—	—
All Others.....	—	—	—	—	—	—	3	2	25	15	1	43	1	102	96	15	33	246	1.00	—	174	—
Totals.....	22	38	9	3	1	—	7	107	78	234	85	504	500	4,141	412	363	2,477	7,393	$1,207,772.23	$163.36	5,068	94

1946 — January 1 – October 1 — 9 Months — *Continued*

Totals.....	22	—	12	—	3	—	12	71	66	231	29	397	289	3,343	300	318	1,954	5,915	$1,025,918.20	$174.11	4,265	44

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CRIMINAL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946

Counties	CRIMINAL CASES													
	Number remaining at first of year.	Number of Indictments returned.	Number of appeal cases entered.	Appeals withdrawn before sitting following Entry.	Appeals withdrawn after next sitting, under St. 1937, c. 311.	Number of actions on bail bonds for recognizance entered.	Number disposed of in previous years brought forward for redisposition.	Indictments waived.	Number disposed of during year.	Number remaining at end of year.	Number tried during year.	Number awaiting trial at end of year.	Number of days during which a Superior Court judge has sat for trials, hearings or dispositions.	Days District Court judges were called in to sit in Superior Court.
Barnstable	43	73	31	5	3	0	3	10	124	36	38	12	16½	0
Berkshire	85	40	37	13	4	1	–	2	101	64	16	59	18	–
Bristol	42	296	329	52	1	3	39	36	641	51	122	27	44	25
Dukes	–	7	3	1	0	0	0	0	14	1	11	1	2	0
Essex	64	235	574	91	9	0	31	65	804	65	172	56	68	32
Franklin	16	20	11	4	0	0	1	0	22	22	1	16	3	0
Hampden	63	100	151	31	16	0	3	21	230	61	57	58	66	8
Hampshire	133	59	42	11	2	0	14	14	112	137	6	61	7	2
Middlesex	256	1,002	680	24	40	2	60	17	1,605	412	313	361	202	9
Nantucket	2	4	2	0	0	0	2	0	6	0	6	0	2	0
Norfolk	496	367	249	41	14	0	60	17	590	544	122	456	62	28
Plymouth	121	327	242	23	7	0	90	13	581	159	139	4	59	29
Suffolk	1,648	1,118	2,091	58	87	17	265	2	3,302	296	692	271	490	14
Worcester	38	279	284	28	17	0	41	164	732	43	126	40	66	45
Total	3,007	3,927	4,726	382	200	23	609	361	8,864	1,891	1,821	1,422	1,105½	192

Note — 14 complaints by District Attorney in Worcester County.

* Three justices sat for nine additional days in Suffolk County in the appellate division for the review of sentences to the state prison under St. 1943 c. 558.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE

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ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946

MADE BY THE CLERKS OF COURT TO THE JUDICIAL COUNCIL IN COMPLIANCE WITH ST. 1936, C. 3, § 3

CIVIL CASES

Table 1 — NUMBER UNDISPOSED OF AT BEGINNING OF YEAR, JULY 1, 1945

County	Law								Equity	Divorce and Nullity	Total Jury Cases	Total Non-Jury
	Jury Cases				Non-Jury							
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others				
Barnstable	72	85	30	17	64	2	6	10	23	0	204	82
Berkshire	48	74	17	7	37	7	10	10	136	0	146	64
Bristol	350	1,436	290	48	96	19	39	38	235	0	2,124	192
Dukes	5	5	2	0	6	0	0	1	7	0	12	7
Essex	219	1,135	290	21	72	45	34	17	175	0	1,665	168
Franklin	6	41	6	2	10	1	4	1	11	0	55	16
Hampden	236	1,196	292	82	127	7	8	28	297	2	1,806	170
Hampshire	29	96	26	7	13	2	2	17	27	61	158	34
Middlesex	531	3,831	892	65	235	50	58	92	758	2	5,319	435
Nantucket	9	0	1	0	6	0	1	0	0	0	10	7
Norfolk	295	1,046	347	58	934	28	38	61	184	0	1,746	1,061
Plymouth	69	379	55	6	55	16	7	13	143	0	509	91
Suffolk	1,154	5,245	2,559	154	611	552	293	317	1,539	2	9,112	1,773
Worcester	367	1,788	537	47	152	83	67	48	289	0	2,739	350
Totals	3,390	11,357	5,344	514	2,418	812	567	653	3,824	67	25,605	4,450
Combined Totals	25,605				4,450							
	Total undisposed of all kinds 30,055								33,946			

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

CIVIL CASES

Table 2 — Number of New Cases Entered During the Year

County	Original Writs				Removals from District Courts								Equity	Divorce and Nullity	All Others
					By Plaintiff or Order of Ct.				By Defendant						
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others			
Barnstable	34	32	16	8	0	0	0	0	4	13	2	1	23	0	0
Berkshire	34	92	13	11	0	0	0	0	8	2	1	1	31	0	0
Bristol	82	426	117	12	56	201	20	3	0	0	0	6	109	0	0
Dukes	0	5	0	1	1	0	0	0	0	0	0	0	2	0	0
Essex	204	745	219	9	0	0	0	3	81	431	44	18	146	0	22
Franklin	10	21	7	1	0	0	0	0	1	10	0	0	7	0	10
Hampden	146	704	140	92	0	2	0	0	42	47	28	0	145	1	0
Hampshire	14	80	10	3	0	0	0	0	3	11	0	0	12	90	0
Middlesex	299	2,056	476	60	1	7	3	10	83	653	45	31	359	0	0
Nantucket	1	1	—	—	—	0	—	—	—	—	—	—	2	—	—
Norfolk	79	472	108	61	0	0	0	0	34	159	19	0	97	1	0
Plymouth	69	173	41	0	0	0	0	0	11	51	6	0	56	0	47
Suffolk	617	3,405	1,604	513	8	89	20	3	203	513	113	57	783	0	0
Worcester	179	862	253	1	0	20	0	1	56	362	93	11	152	0	38
Total	1,768	9,074	3,004	682	66	319	43	20	526	2,252	351	125	1,924	93	117
Combined Totals	14,528				448				3,254				2,133		
Total removals	3,702														
Grand Total Entries	20,363														

Note. In Suffolk 120 cases were transferred from district courts by order of the superior court for trial.

Grand Total Entries .....

Note. In Suffolk 120 cases were transferred from district courts by order of the superior court for trial.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

County	CIVIL CASES											
	Table 3		Number of Trials Cases Tried									
			Jury				Non-Jury					
	Total Jury Trials	Total Non-Jury Trials Incl. Eq. and Div.	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Equity	Divorce and Nullity
Barnstable	16	0	1	14	1	0	0	0	0	0	1	0
Berkshire	26	13	5	18	2	1	7	1	1	4	4	0
Bristol	119	8	9	88	20	2	4	2	2	0	5	0
Dukes	0	0	2	0	0	0	0	0	0	0	0	0
Essex	303	27	25	219	53	6	9	5	4	9	31	0
Franklin	7	4	1	3	3	0	0	0	2	2	0	0
Hampden	282	25	15	227	37	3	12	7	3	3	26	0
Hampshire	17	3	3	13	1	0	1	0	0	2	1	56
Middlesex	380	29	27	253	95	5	13	3	11	2	91	0
Nantucket	0	0	0	0	0	0	0	0	0	0	1	0
Norfolk	105	8	7	66	26	6	3	3	1	1	6	1
Plymouth	118	18	9	93	15	1	2	0	2	9	11	0
Suffolk	736	153	121	390	207	18	72	15	27	39	264	0
Worcester	243	14	12	147	80	4	4	3	2	5	27	0
Total	2,354	297	237	1,531	540	46	127	39	55	76	468	57
Total trials			3,176								525	

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

CIVIL CASES

Table 4 — NUMBER OF JURY VERDICTS

COUNTY	FOR PLAINTIFF																		FOR DEFENDANT					
	ORDERED			NOT ORDERED			LESS THAN $200			$200 TO $500			$500 TO $1,000			OVER $1,000			ORDERED			NOT ORDERED		
	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts
Barnstable	0	0	0	0	1	1	0	1	0	0	1	1	0	0	0	0	0	0	0	0	0	0	12	0
Berkshire	0	0	0	3	10	2	0	0	1	1	2	0	1	2	0	1	6	1	1	0	0	1	8	0
Bristol	0	0	0	6	50	12	0	6	2	2	15	2	1	2	2	3	27	6	1	0	0	2	38	8
Dukes	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0
Essex	0	0	0	15	72	10	1	15	1	3	22	3	3	17	1	8	19	6	3	3	10	3	68	19
Franklin	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	1	1	0	0	1	1	2	1
Hampden	0	0	0	6	82	16	1	13	1	2	24	0	2	14	11	1	31	4	3	3	8	3	52	6
Hampshire	0	0	0	0	0	0	0	0	0	0	0	0	0	2	1	1	7	0	0	0	0	0	0	0
Middlesex	0	0	0	16	165	59	3	31	13	4	43	17	6	35	15	3	56	14	1	20	9	12	74	29
Nantucket	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Norfolk	0	0	0	6	32	18	2	8	5	1	6	4	1	7	5	2	11	4	0	9	5	1	55	13
Plymouth	0	0	1	6	36	3	2	9	0	3	7	1	1	8	0	0	12	2	1	2	2	3	31	5
Suffolk	1	5	2	43	234	105	2	57	16	9	56	32	13	47	18	20	79	41	29	52	15	48	99	85
Worcester	0	0	0	8	40	21	1	5	2	3	10	4	2	4	2	2	29	12	0	1	26	2	34	19
Totals	1	5	3	109	723	248	12	145	41	28	186	64	31	138	55	42	278	91	39	90	76	76	473	185
							Total for Plaintiff 2,200												Total for Defendant 939					

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

CIVIL CASES

Table 5 — NUMBER OF NON-JURY FINDINGS

County	Findings for Plaintiff												Findings for Defendant		
	Less than $200			$200 to $500			$500 to $1,000			Over $1,000					
	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts
Barnstable	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Berkshire	0	0	0	1	0	0	2	0	0	0	0	0	4	2	1
Bristol	1	1	0	1	1	0	0	0	0	2	0	0	0	0	2
Dukes	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Essex	2	0	0	2	3	0	0	0	2	1	0	1	3	2	1
Franklin	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
Hampden	5	0	0	1	0	0	0	3	0	0	1	0	1	2	2
Hampshire	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Middlesex	6	3	2	3	0	0	3	0	0	5	1	0	3	9	16
Nantucket	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Norfolk	0	1	0	1	1	0	0	1	0	2	0	0	0	1	0
Plymouth	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0
Suffolk	12	2	5	13	2	3	2	2	2	16	5	4	29	4	13
Worcester	0	0	0	0	0	0	0	0	0	0	0	1	6	3	1
Total	26	7	7	22	7	3	7	6	4	26	7	7	48	23	37
Combined Totals	40			32			17			40			108		
	129												108		

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

County	CIVIL CASES																Equity	Div. and Nul.
	Table 6 — Finally Disposed of																	
	Jury								Non-Jury									
	On Auditor's Report				Otherwise				On Auditor's Report				Otherwise					
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	0	0	0	0	19	36	9	1	0	0	0	1	22	0	1	2	8	0
Berkshire	0	0	0	0	29	83	8	1	0	0	0	0	15	6	2	10	40	0
Bristol	0	0	0	0	168	606	125	27	0	0	0	0	75	61	20	26	219	0
Dukes	0	0	0	0	2	2	0	0	0	0	0	0	1	0	0	0	2	0
Essex	0	0	0	0	198	1,092	263	30	0	0	1	0	84	52	33	23	218	0
Franklin	0	0	0	0	4	30	5	0	0	0	0	0	1	2	4	1	4	0
Hampden	0	0	0	0	250	1,342	288	99	0	0	0	0	112	5	9	26	300	2
Hampshire	0	0	0	0	10	75	12	4	0	0	0	0	3	5	1	10	9	35
Middlesex	0	0	0	0	380	2,660	631	47	0	4	0	0	200	49	42	132	691	1
Nantucket	0	0	0	0	0	0	0	0	0	0	0	0	8	1	0	0	1	0
Norfolk	0	0	0	0	101	562	151	28	0	0	0	0	38	10	9	28	64	1
Plymouth	0	0	0	0	46	270	37	2	0	0	0	0	22	5	1	14	38	0
Suffolk	0	0	0	0	822	3,685	1,980	95	0	0	0	0	350	236	119	175	1,252	0
Worcester	1	4	3	0	210	948	300	33	1	1	1	0	96	49	37	46	219	0
Total	1	4	3	0	2,239	11,391	3,809	367	1	5	2	1	1,027	481	278	493	3,065	39
Combined Totals	8				17,806				9				2,279				3,065	39
	Total disposed of all kinds—23,206																	

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

County	CIVIL CASES													
	Table 7 — Cases Triable i. e. at Issue and Awaiting Trial and not Marked Inactive													
	Jury				Non-Jury				Triable but Enjoined				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	36	57	27	10	20	2	2	4	0	0	0	0	13	0
Berkshire	22	67	14	3	16	5	5	5	0	0	0	0	17	0
Bristol	207	1,156	238	16	33	11	11	18	0	0	0	0	53	0
Dukes	2	5	2	0	4	0	0	1	0	0	0	0	6	0
Essex	223	1,186	255	14	36	30	17	12	0	8	0	0	94	0
Franklin	7	29	4	8	10	4	3	0	0	0	0	0	5	0
Hampden	130	651	169	43	59	8	2	34	0	0	0	0	142	1
Hampshire	10	69	14	0	3	2	1	2	0	0	0	0	8	58
Middlesex	425	3,703	739	39	125	43	36	43	0	74	0	0	160	0
Nantucket	0	0	0	0	1	0	0	0	0	0	1	0	1	0
Norfolk	176	787	231	31	39	22	26	39	3	15	0	0	137	0
Plymouth	44	219	53	7	26	14	5	13	0	0	0	0	44	0
Suffolk	945	3,871	2,032	81	341	154	105	149	2	26	4	1	350	0
Worcester	291	1,855	461	17	66	69	42	5	0	7	1	0	115	0
Totals	2,518	13,655	4,239	269	779	364	255	325	5	130	6	1	1,145	59
Combined Totals	20,681				1,723				142				1,145	59

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

CIVIL CASES

Table 8 — Cases Remaining Undisposed of Including Cases Marked Inactive

County	Jury				Non-Jury				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	78	93	38	23	56	4	5	11	35	0
Berkshire	42	80	21	11	41	6	10	7	127	0
Bristol	275	1,385	294	30	66	30	29	24	123	0
Dukes	5	5	2	0	6	0	0	1	7	0
Essex	241	1,221	272	16	54	31	18	21	153	0
Franklin	8	37	5	10	14	4	3	3	14	0
Hampden	135	685	187	44	63	8	4	36	150	1
Hampshire	34	107	24	3	12	2	1	10	30	116
Middlesex	415	3,877	720	47	136	55	51	49	427	1
Nantucket	0	0	1	0	6	0	1	0	1	0
Norfolk	284	1,108	317	61	80	27	38	64	216	0
Plymouth	74	338	68	9	59	22	10	21	161	0
Suffolk	940	5,445	2,474	422	481	438	216	352	1,090	2
Worcester	329	2,027	510	32	117	86	49	35	222	0
Totals	2,860	16,408	4,933	708	1,191	713	435	634	2,756	120
Combined Totals 33,103	24,909				2,973				2,756	120

Total undisposed of, all kinds—30,758

Note. Last year 1,718 cases had been transferred to the Non-triable docket in Suffolk; 169 were restored this year; 206 were disposed of on the non-triable docket; 218 were ordered transferred to the non-triable docket after hearing in pre-trial session: leaving 1,561 cases undisposed of on this docket.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE

Note. Last year 1,718 cases had been transferred to the Non-triable docket in Suffolk; 169 were restored this year; 206 were disposed of on the non-triable docket; 218 were ordered transferred to the non-triable docket after hearing in pre-trial session: leaving 1,561 cases undisposed of on this docket.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

County	CIVIL CASES									
	Table 9 — Cases Marked Inactive in Previous Years									
	Jury				Non-Jury				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	16	16	8	1	16	0	2	3	6	0
Berkshire	8	4	2	1	9	1	3	7	27	0
Bristol	22	75	29	0	10	1	2	0	4	0
Dukes	2	0	2	0	2	0	0	0	1	0
Essex	0	2	2	0	1	0	1	0	4	0
Franklin	2	4	2	1	2	0	0	0	4	0
Hampden	2	19	12	0	3	0	1	2	3	0
Hampshire	15	14	3	3	6	0	0	5	10	6
Middlesex	8	89	15	3	4	3	1	0	323	0
Nantucket	0	0	1	0	6	0	0	0	0	0
Norfolk	68	243	56	16	17	1	4	8	54	0
Plymouth	17	17	6	1	16	6	3	3	41	0
Suffolk	60	168	106	6	189	143	65	37	7	0
Worcester	17	71	15	5	11	3	2	0	6	0
Totals	237	722	259	37	290	158	84	65	490	6
Combined Totals	1,255				597				490	6
	Total of all kinds marked inactive in previous years—2,348									

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

County	CIVIL CASES									
	Table 10 — Cases Marked Inactive During the Year									
	Jury				Non-Jury				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	17	9	2	12	8	0	1	4	2	0
Berkshire	7	3	1	1	4	0	0	1	26	0
Bristol	13	59	16	0	2	1	5	0	6	0
Dukes	0	0	0	0	0	0	0	0	0	0
Essex	3	45	8	7	3	0	0	0	0	0
Franklin	0	6	0	0	0	0	0	0	0	0
Hampden	1	2	2	1	0	0	0	0	3	0
Hampshire	4	9	3	0	1	0	0	1	4	4
Middlesex	4	73	10	0	1	1	0	1	0	0
Nantucket	0	0	0	0	0	0	0	0	0	0
Norfolk	41	87	28	12	14	0	4	4	23	0
Plymouth	6	28	4	0	7	2	0	0	19	0
Suffolk	32	171	61	12	13	4	14	12	8	1
Worcester	11	75	12	6	13	4	5	3	12	0
Total	139	567	147	51	71	12	29	26	103	5
Combined Totals	904				138				103	5
	Total marked inactive of all kinds—1,150									

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1946—*Continued*

COUNTY	CIVIL CASES — Table 11 — Inactive Cases Dismissed During Year										Table 12 — Number of Days in which Court Sat	
	Jury				Non-Jury				Equity	Divorce and Nullity	Jury	Non-Jury Including Equity and Motion and Pre-Trial Sessions
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others				
Barnstable	3	18	3	0	8	0	1	4	2	0	10	1½
Berkshire	1	0	0	0	3	0	0	2	8	0	30	14
Bristol	18	12	5	0	4	0	2	1	0	0	125	25
Dukes	0	0	0	0	0	0	0	0	0	0	0	0
Essex	0	0	0	0	0	0	0	0	0	0	257	75
Franklin	0	0	0	0	0	0	0	0	0	0	11	11
Hampden	76	156	78	21	39	0	5	2	117	0	177	70
Hampshire	5	7	6	4	1	0	1	4	4	0	35	8
Middlesex	0	6	0	0	0	0	0	0	0	0	486	221
Nantucket	0	0	0	0	0	0	0	0	0	0	0	3
Norfolk	40	44	30	1	11	0	5	11	28	0	115	14
Plymouth	10	11	8	0	7	0	0	2	15	0	83	18
Suffolk	40	53	97	13	111	113	59	59	4	0	1,143	870
Worcester	9	13	12	1	2	3	0	0	5	0	243	44
Totals	202	320	239	40	186	116	73	85	183	0	2,715	1,374½
Combined Totals	801				460				183	0	4,089½ days	

Total dismissed all kinds—1,444

**The 870 days without juries in Suffolk (See Table 12) include 413 days for trials of actions at law in which a jury was waived, and hearings on the merits in Equity cases, 298 days in the Equity Motion Session and 159 days in the pre-trial session.

REPORTS OF REGISTERS OF PROBATE FOR YEAR ENDING DEC. 31, 1945

(Table prepared by the Administrative Committee of the Probate Courts)

	Probate—Decrees																Divorces		Fees Collected				
	Original entries (New Cases)	Administrations Allowed	Wills allowed	Guardians Appointed	Conservators Appointed	Trustees Appointed	Accounts Allowed	Real Estate Sales	Real Estate Mortgages	Real Estate Partitions	Equity Decrees	Separate Support	Desertion and Living Apart	Custody	Other Decrees and Orders Entered	Papers Recorded	Original Entries (New Cases)	Decrees and Orders Entered: Nisi	Decrees and Orders Entered: Others	Probate	Divorce	Certificates and Copies	Total	Commitment, Insane Feeble Minded
Barnstable	419	152	156	30	7	28	350	83	9	5	3	2	0	1	119	2,100	175	93	17	$2,858.80	$875.00	$1,906.65	$5,640.45	2
Berkshire	1,055	381	275	86	23	39	696	177	5	4	19	42	9	8	439	3,088	387	216	249	5,500.00	1,975.00	2,750.40	10,225.40	3
Bristol	2,173	902	521	197	43	49	690	420	5	15	16	73	17	13	1,424	7,419	1,173	791	368	9,958.00	5,855.00	5,911.13	21,724.13	4
Dukes	91	28	49	6	4	9	48	20	0	3	0	0	0	1	17	525	22	13	1	565.00	110.00	224.35	899.35	0
Essex	3,538	1,566	945	295	58	165	2,257	613	6	17	33	72	7	18	1,372	10,525	1,280	807	559	19,170.00	6,390.00	9,333.82	34,893.82	0
Franklin	496	161	122	22	11	24	293	77	0	7	4	2	2	4	220	2,708	140	94	33	2,431.00	700.00	743.25	3,874.25	0
Hampden	2,030	780	428	162	49	41	1,486	288	9	4	28	98	2	25	841	10,605	1,151	728	347	10,920.00	5,755.00	4,540.06	21,215.06	13
Hampshire	1,697	215	146	24	5	8	357	118	1	1	2	3	0	0	140	2,369	40	28	5	2.930.00	200.00	1,249.75	4,379.75	1
Middlesex	6,452	2,581	1,717	652	152	317	3,066	1,022	38	15	89	117	11	36	4,495	23,245	2,688	1,554	1,451	34,939.00	13,385.00	21,315.15	69,639.15	13
Nantucket	43	17	23	5	1	7	30	6	0	1	0	0	0	0	7	131	10	9	7	284.00	50.00	62.20	396.20	0
Norfolk	2,730	920	784	263	49	156	2,720	353	9	3	55	35	6	24	1,932	13,051	874	473	789	16,345.00	4,165.00	10,845.41	31,355.41	42
Plymouth	1,504	654	385	123	25	57	817	278	6	5	15	33	4	2	241	6,153	631	373	175	7,779.00	3,155.00	2,839.85	13,773.85	7
Suffolk	5,830	2,548	1,194	589	131	295	4,929	607	15	35	86	215	13	18	6,527	27,817	2,845	1,546	1,958	32,372.00	14,175.00	17,555.55	64,102.55	1,280
Worcester	3,527	1,379	809	363	109	88	2,118	587	23	10	62	146	7	4	2,612	10,864	1,581	940	297	16,188.00	7,905.00	7,442.60	31,535.60	20